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Alberta Electric System Operator

2003 General Tariff Application - Liability Protection
Part B: Board Determinations and Recommendations

December 18, 2003

Alberta Energy and Utilities Board

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ALBERTA ENERGY AND UTILITIES BOARD
Decision 2003-109: Alberta Electric System Operator
2003 General Tariff Application – Liability Protection
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Application No. 1306252

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ALBERTA ENERGY AND UTILITIES BOARD
Calgary Alberta

ALBERTA ELECTRIC SYSTEM OPERATOR
2003 GENERAL TARIFF APPLICATION -
LIABILITY PROTECTION — **Decision 2003-109**
PART B: BOARD DETERMINATIONS — **Application No. 1306252**
& RECOMMENDATIONS — **File No. 1808-1-1**

1 BACKGROUND

In a letter dated June 25, 2003, the Board directed the Alberta Electric System Operator (AESO) to a propose a process, by July 4, 2003, pursuant to which the Board could hear and determine certain issues relating to liability protection that had arisen in the context of the AESO's 2003 General Tariff Application (2003 GTA).[1] This aspect of the 2003 GTA came to be referred to as the Liability Module. In response to the Board's request, the AESO proposed both a process and an interim amendment to the Terms and Conditions of Service (T&Cs) of its existing tariff.[2] Specifically, the AESO proposed the following:

> At the present time, and as an interim measure, the AESO believes it is necessary and prudent to amend Article 14 of its Tariff to include both the express right of the AESO to indemnify persons who provide ancillary services to the AESO and also to expressly grant indemnification protection for Customers who provide ancillary services pursuant to Article 24.

By way of a letter dated July 17, 2003, the Board issued a Notice of Proceeding establishing a schedule for the final consideration of the issues raised in the Liability Module (Notice). A copy of the Notice is attached as Appendix A to this Decision.

After considering comments received from parties in response to both aspects of the AESO's proposal, the Board issued Decision 2003-059 on July 18, 2003, in which it approved, with some reservation, the interim amendment to Article 14 of the AESO's T&Cs pending the disposition of the issues dealt with in the present Decision.[3] The interim approved Article 14 is reproduced in Appendix B to this Decision.

The proceeding then continued according to the schedule set out in the Notice until August 22, 2003, when the Board indicated that it would make its final determinations in the Liability Module according to a written process. The Board suspended the balance of the schedule until August 28, 2003, when it issued a further letter to parties providing a suggested argument outline and list of issues that the Board wanted parties to address, at a minimum, in their arguments. This letter also revised the schedule to allow for written Argument and Reply on September 12, 2003 and September 19, 2003, respectively.

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1 Application No. 1290683

2 Originally approved by the Board in Decision 2002-087, *ESBI Alberta Ltd., 2002 Tariff Refiling* (October 8, 2002).

3 Decision 2003-059, *Alberta Electric System Operator, 2003 General Tariff Application – Liability Protection Part A: Interim Amendment to Article 14* (July 18, 2003)

The parties who participated in the proceeding are listed in Appendix C to this Decision.

The Board received Reply from all parties by September 19, 2003. However on September 22, 2003, ATCO Power responded to comments in IPCAA's Reply with respect to certain materials attached to ATCO Power's Argument. Accordingly, the Board considers that the record for this Decision closed on September 22, 2003.

2 SUMMARY OF APPLICATION

As emphasized in its July 3 letter, the AESO considers that in the absence of some form of liability protection for ancillary service providers (ASPs), the reliability of the Alberta Interconnected Electric System (AIES) is put at risk. Because the AESO has the statutory responsibility under the *Electric Utilities Act*[4] to ensure the reliability of the AIES, the AESO found it necessary in the circumstances to seek the Board's assistance in crafting a solution that would provide ASPs with a sufficient level of comfort on an interim basis that they would once again offer their services to the AESO until such time as a longer term resolution of the issue can be determined.

Because a number of ASPs (AP, CMH, EPCOR, TransAlta and TCE) advised the AESO that they would no longer provide ancillary services in the absence of some liability protection, the AESO proposed on an interim basis to amend Article 14 of its T&Cs. The AESO's proposed amendments were essentially twofold:

1. Article 14.2 authorizes the AESO to indemnify ASPs for what amounts to consequential damages that may be suffered by the ASP as a result of providing their services to the AESO pursuant to a contract.
2. Article 14.3 requires the AESO to indemnify a customer who is required to provide ancillary services under Article 24 (i.e. in the absence of a contract with the AESO). This indemnity includes both direct and consequential damages, except direct damages caused by the customer's negligence, wilful misconduct or breach of contract.

An indemnification procedure was established and set out in Article 14.4.

The AESO had proposed this amendment on an interim basis only in order to provide sufficient comfort particularly to those ASPs who had withdrawn the provision of services because they considered that sufficient liability protection was not available to them under the EUA as of June 1, 2003.

In its interim Decision 2003-059, the Board said the following:

> For all of these reasons, therefore, the Board concludes that, on an interim basis in these unique and pressing circumstances, it is just and reasonable and in the public interest to approve amended Article 14 of the AESO's T&C as set out in Appendix B to this Order.

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4 S.A. 2003, c. E-5.1

The Board emphasizes that its determinations in this Decision are strictly interim in nature and are without prejudice to the right of parties to make any submissions and file relevant evidence in the forthcoming process.[5]

3 VIEWS OF THE PARTIES

Views of the AESO

In its submission, the AESO maintained that a legislative solution was best, terming it clear, efficient and strong. The AESO further submitted that the Board should recommend a legislative approach to the Government. With respect to the degree of protection to be afforded, the AESO suggested that it would be appropriate to extend the same level as was extended to itself by the EUA. That is, parties would only be liable for direct damages in cases of negligence. Agents, officers and employees would only be liable for acts of bad faith.

The AESO also stated that it considered S. 90 provided legal protection to ASPs and TFOs. The AESO noted the Board had authority to determine a question of law concerning the interpretation of the EUA and recommended that the Board should do so in this case.

The AESO did not recommend a tariff-based approach, stating such a system would be fraught with a number of uncertainties. In particular, the AESO stated that it was not even certain the Board had the authority to authorize a tariff-based approach. The AESO also noted that such a scheme would be complex, as it would involve all the DISCOs and TFOs. Such a scheme would be troubled by the lack of privity of contract. Finally, indemnification would also have to be part of such a scheme, raising the issue of how such indemnities would be financed.

In argument, the AESO maintained the positions it took in its original evidence, stating that while a legislative solution was best it also felt that S. 90 of the EUA provided protection to ASPs and TFOs. The AESO also understood the view that without a favourable judicial ruling on this question of law, reliance upon section 90 can and should give way to a more precise and definitive legislative solution, however.

The AESO noted that in the deregulated market considerable legal uncertainty has developed. AESO suggested the evolution of class action lawsuits was a factor. It was also uncertain what "duty of care" a utility could be said to owe to a party that is not a direct customer. There has been very little litigation concerning liability for outages.[6] While fewer claims were a good thing, the attendant uncertainty about how the "next" claim would go could not be ignored.

When the Liability Protection Regulation (LPR) was in place, no action could proceed against a "transmission person" and a transmission person was not liable for a "transmission person act" unless that act was the result of willful misconduct, negligence, and breach of contract or, in the case of an individual, failure to act in good faith. In any event, a transmission person could only be liable for direct loss or damage. The LPR also distinguished between providers of system

5 Decision 2003-059, page 6

6 But recent litigation has arisen and referred to in this proceeding. See FIRM-AltaLink-Liab-3. The AESO is also generally aware of pending litigation in respect of the recent blackout that occurred in the north-eastern United States and Canada, much of which is based upon class action claims.

support services and black start services.[7] Section 3.1(2) precluded any legal action against a black start service person and excluded liability for any black start service act, except for breach of contract. This meant that black start service providers, unlike system support service providers, were immune from all claims for direct or indirect loss caused by failure to act in good faith, willful misconduct or negligence. For claims arising in breach of contract, the scope of damages that could be recovered was not limited.[8]

The AESO also stated that the evidence clearly suggested that before industry restructuring, tariffs and contractual arrangements:

- Provided effective protection to the vertically integrated utility and its customers since such provisions applied to all regulated services in the supply chain.
- Limited the causes of actions available to customers to the negligence or intentional wrongdoing of the utility, its agents, or employees.
- Precluded customers from suing for indirect or consequential loss or damages, whether such losses or damages related to the utility's negligence or otherwise.
- Did not expressly protect directors and officers, nor attempt to limit non-customer claims.

The AESO submitted that tariff-based liability protection proposals were so unfavourable that it is inappropriate to refer to them as a "solution". Any tariff mechanism would require that some party, most likely the AESO, indemnify others against liability. In that event, it would be essential for the Board to specifically direct that indemnities be provided and ensure that the AESO is able to recover the costs incurred in that respect. This is necessary to ensure that the AESO can satisfy any indemnity obligation.

The AESO claimed another important criterion for assessing the viability of tariff/indemnity mechanisms concerned the broad scope of their application. In the current disaggregated supply chain, there are vastly more parties than was once the case in the vertically integrated structure. These parties participate in, but may or may not be a commercial party to, arrangements required by the AESO to fulfil its statutory duties. If the governing principle is that there should be liability protection, all parties in the supply chain can lay legitimate claim to that protection.

The AESO maintained it was clear from the evidence in this proceeding that the Miltom Report, and the extensive public consultations that both preceded and followed it, created a climate of expectation in the industry that new and better protection was on the way. The fact that some providers were willing to continue to provide services under imperfect conditions, in anticipation of improvements to follow shortly, should not lead to the incorrect conclusion that what exists now is acceptable. Nor would it necessarily be acceptable to simply revert to the situation of the LPR, without dealing with the expectation that the protection provided then would be significantly improved.

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7 Section 3.1(1)(a) of the LPR defined "black start service" as follows: "black start service" means, following a partial or complete black out, the start up of a generation unit without external electrical supply and thereafter energizing of a portion of the interconnected electric system to allow other connected generating units to start up.

8 Nothing in the Regulation precluded parties to a black start service contract to establish, in the agreement, the scope of damages for which parties could be held liable for.

From earlier correspondence received by the AESO from several ASPs,[9] it was clear that absent significantly improved liability protection, some parties will simply not participate in that market. The AESO believed that this will interfere with its statutory duty to act responsibly under the EUA, and in particular, to "provide for the safe, reliable and economic operation of the interconnected electric system, and to promote a fair and efficient and openly competitive market for electricity". As a result, it was possible that the AESO would be increasingly forced to procure ancillary services pursuant to Article 24 of its Tariff.

The AESO confirmed that it supported the extension of liability protection to directors, officers and employees of an entity which itself is protected, no matter the particular mechanism adopted. If corporations or other entities that provide services to the AESO require liability protection because they do not have sufficient revenues or assets to cover even a small portion of potential claims, it was just and reasonable, if not compelling that individual directors, officers and employees be given equivalent protection.

With respect to S. 90 the AESO noted the most recent and authoritative position of the ADOE was found in correspondence dated August 7, 2003 from the Deputy Minister (Attachment A, ENMAX-AESO-07). The position of the Deputy Minister on behalf of the government is that section 90 of the EUA was intended to afford liability protection to ASPs and TFOs and others who contract with the Independent System Operator (AESO) to provide services.

In the AESO's submission, before the Board makes an order, or finally approves terms and conditions of tariffs prescribing liability protection/indemnification, it should first determine the scope of protection afforded by section 90 of the EUA. This was so, since the scope of protection provided by way of an order of the Board or a tariff cannot be inconsistent with the scope of protection under the EUA. To do otherwise would require the Board to approve terms and conditions which may be broader in scope than that permitted by the enabling legislation.

The AESO maintained, however, that the scope of the question is now much broader. As noted, are PPA buyers, and owners, directors, officers, employees as well as agents or representatives of these and other entities, to be afforded liability protection? As these parties may not contract with the AESO to provide ancillary and transmission services, nor are they necessarily AESO agents, there is doubt whether section 90 can be reasonably interpreted to include them.

The AESO summarized the gaps in S. 90 identified in this proceeding as follows:

- Does the legislation afford liability protection to directors, officers and employees of ASPs and TFOs who provide services to the AESO? Their agents and representatives?
- Does the legislation afford liability protection to PPA owners or PPA buyers and their directors, officers and employees when ancillary services are provided to the AESO?
- Does the legislation afford liability protection to parties who provide ancillary services to AESO by way of Watt-Ex?

The AESO submitted that regulations under S. 94 would resolve the uncertainty created by the above and that the Board should recommend such action to the government. In the interim, the

[9] This correspondence was previously provided to the Board and attached to AESO's letter dated July 3, 2003.

previously approved amendments to the T&Cs should be left in place. Should the government not take any action by a defined end date then the parties would have to return to the table to finalize the terms of a tariff/indemnification mechanism.

In its reply, the AESO noted that, with few exceptions, there existed a clear consensus in favour of a legislated solution to the question of liability protection in the electricity industry in Alberta. Similarly, virtually all parties agree that the Board, either in its decision or otherwise, should strongly recommend to the Government of Alberta that it undertake a legislated solution as quickly as possible.

Again with minor exception, the AESO submitted there was a clear consensus that while a tariff/indemnity mechanism can potentially address the question of liability protection, and is perhaps better than taking no action at all, this is clearly considered to be 'second-best', having a number of problems which can clearly be avoided by a legislated solution.

In particular, the AESO noted ENMAX (and EPCOR as well) usefully raised Paragraph 121(2)(c) of the EUA which at least <u>suggests</u> that any tariff mechanism for liability protection first requires the enactment of regulations by the LGIC under Section 94. Whether such an interpretation is likely or not, this is another element of uncertainty, which required resolution. The AESO concurred with the view of ENMAX that Paragraph 121(2)(c) underscored the immediate need for a legislated solution.

The AESO noted that while IPCAA believed that Section 90 of the *Electric Utilities Act* (EUA) provided adequate protection for ASPs and TFOs, at the same time, it argued strongly that there should be no changes to tariffs or legislative action without the agreement of all stakeholders. The AESO termed curious that IPPCA seemed to take this position on the basis that legislative protection for some parties and not others is inconsistent with the restructured environment.

The AESO noted that AP did not recommend that the Board should advocate legislated solutions, simply indicating that this is a matter which industry may pursue (Paragraph 36). No reasons are given for this position. As noted by the AESO and many other parties, the Board's recommendations will be of considerable value and add considerable weight to the proposition that the Government should, for example, enact regulations pursuant to Section 94 of the EUA in order to specify in detail the extent of the liability protection that should be in place in the market today.

The AESO stated that as long as all parties and the Board understand that the effect of EPCOR's recommendation that the Board not interpret Section 90 of the EUA will cut off that avenue of recourse to the Alberta Court of Appeal the AESO did not take an insistent position in this regard.

The AESO acknowledged the points made by CMH with respect to the unique position of black start providers (BSPs) within the context of the liability protection debate. CMH appears to be the only pure BSP participating in this proceeding, and the AESO noted CMH's willingness to reinstate black start services assuming an adequate degree of liability protection is in place. The AESO commended to the Board the details offered by the City as to how BSPs should be protected.

Views of the Service Providers[10]

In their submission, TransAlta stated the reasons for adopting liability protection included the following:

1. Electricity service is not and has never been guaranteed – Service interruptions occur due to many causes including weather events and equipment failures. Negligence of a service provider is rarely a cause.

2. Electricity services are low cost compared to the potentially immense costs associated with consequential damages. Electricity is an integral service to many commercial and industrial businesses and is provided at a relatively low cost. It is unreasonable to expose a service provider receiving relatively small revenue to the risk of extremely large claims for service interruption. Prudent service providers would assess exiting the business if the risk were extreme. As discussed below, insurance does not appear to be available, and, even if available, would only be so at a significant costs that would be passed on to customers.

3. Power interruption risks are best managed by consumers – Prudent power consumers expect outages will occur and take appropriate precautionary measures to avoid damage or costs due to loss of power supply. The individual consumer is best positioned to manage the power interruption risk and minimize any associated impacts and costs. An upstream service provider has neither the ability nor the capacity to manage the costs and risks of individual downstream consumers.

4. Consumers may insure where appropriate - Some end users may choose to purchase business interruption insurance as a measure to deal with potential power outages. Since the vast majority of power interruptions are not related to the negligence of a service provider, insurance premiums for individual end users are not likely materially influenced by the presence or absence of liability protection. Thus, there are no material insurance savings enjoyed by a consumer by removing liability protection. Were insurance to be available (and it appears not to be so) for an upstream service provider, its costs would be large, and its coverage would in any event be in at least some aspects duplicative of the customer's own insurance. Furthermore, a large number of customers who would choose to decline insurance coverage, due to the low probability and the specific customer impact of a negligence related outage, would be subject to costs of blanket coverage incurred by upstream service providers.

The disaggregation of the industry has not altered any of the reasons for liability protection. However, the changes have interrupted the historic mechanisms available to effect protection to most upstream service providers

With respect to S. 90, TransAlta stated that it provided most of its ancillary service through the Watt-Ex Exchange, not directly to the AESO, and doubted if they were directly an agent or contractor of the ISO, and, absent increased clarity in the statute or a Supreme Court of Canada decision clearly defining the ambit of section 90, could not rely with comfort or assurance on the provisions of section 90 in respect of their ASP role.

[10] Because of the significant commonality among the views of the various service providers, the Board has grouped their views together.

As a TFO, TransAlta is a provider of transmission services through legislated requirement, and therefore may fall outside of the liability protection afforded agents and contractors of the ISO under section 90. Also, TransAlta stated it was apparent from communications by the Alberta Department of Energy (DOE) that section 90 may not be the intended mechanism to provide liability protection to TFOs. A TFO, however, is in a similar position to an ASP when the ASP is required to provide ancillary services under EUA provisions. In those circumstances, the ASP does so pursuant to terms prescribed under Article 24 of the AESO's Terms and Conditions of Service (T&Cs), and attracts AESO indemnity under Article 14 (as established in Decision 2003-059). By comparison, a TFO is obligated by section 39(3)(e) of the EUA to "provide the Independent System Operator with use of the owner's transmission facility for the purpose of carrying out the Independent System Operator's duties, responsibilities and functions." TransAlta noted that the legally mandated provision of Ancillary Services attracts, properly, indemnity from the AESO under its T&Cs, as it so should. TransAlta maintained the legally mandated provision of transmission services by TFO's should attract the same protection.

EPCOR pointed out that TFOs transmission facilities have historically been designed, constructed and operated in Alberta on the basis that TFOs would be protected from liability for damages of an indirect, special or consequential nature. Furthermore, customers have not paid for, and TFOs have not been historically required to provide, transmission service that is free from interruption.

TransAlta also stated, as did EPCOR, that it was appropriate to also include the PPA owner within the indemnity available to those who are committed by others to meet the need for Ancillary Services on the system. In one case, the ISO can under law commit a generator to provide Ancillary Services, in the other; the PPA buyer can under law commit a generator to provide Ancillary Services.

EPCOR stated that when one considered the breadth of participants in the electricity market in Alberta (including large commercial and industrial customers connected to the AIES), it was readily apparent that damage awards against TFOs, ASPs and PPA Owners for indirect and consequential loss could reach levels that would dwarf the revenues earned by these service providers for providing the services in question; would be completely incongruous with the relatively low cost of energy provided to customers; and would have catastrophic financial consequences for the particular service provider and its shareholders.

Watt-Ex submitted that any liability protection provided to ancillary service providers should also include parties who indirectly provide or procure such services through the ancillary services exchange. If the resolution to the liability issue involves the use of indemnities then the terms of such indemnities should also extend to parties using the exchange as well.

TransAlta also stated that insurance was not a viable option for dealing with the potential liability, noting that its insurance broker has indicated that it did not believe that there was any market or capacity available for failure to supply risk that relates to the financial/consequential loss to a third party resulting from the failure to supply. EPCOR echoed TransAlta's comments.

AltaLink stated it had undertaken a maximum foreseeable loss analysis with the assistance of Marsh Canada. The preliminary indication was that AltaLink alone could face a maximum foreseeable loss of approximately $9.4 billion. According to Marsh, the present global capacity

for liability insurance for power utilities is approximately $1.3 billion, which is nowhere near the $9.4 billion limit required. Purchasing a liability limit of $1.3 billion alone would cost several million dollars and key coverage, such as failure to supply, would be subject to significantly reduced sub-limits. Even if commercial insurance solutions were available, they are not in the public interest as the costs and benefits would be allocated inefficiently.

All the Service Providers recommended that a legislative solution was the best. TransAlta stated such liability protection should include the distribution systems, the TFO's and the ASP's (including PPA owners), all of whom are supply services necessary to the functioning of the system, and would be provided in the same ambit as the EUA currently provides to the AESO through section 90. As such, it would extend to directors, officers and employees, and so would resolve the outstanding issue in this regard, as noted by the Board in Decision 2003-059. ATCO Power stated that protection should be from indirect and consequential damages, noting that this would be consistent with the provisions of Part 5 of the EUA. Exposure to direct damages could remain in cases of negligence, willful misconduct or breach of contract (or bad faith for individuals acting on behalf of the protected persons).

ATCO Electric described the government's most recent version of the EUA as partly right in that it got the type of protection right but partly wrong in that it did not extend the scope of the protection to all affected parties. AltaLink advocated that it was not appropriate to allocate third party liability risk to a TFO in a manner that did not accord with historic practice and failed to properly account for the risks undertaken by customers respecting system reliability.

AltaLink claimed that litigation initiated by Sun Gro Horticulture Canada Ltd. (Sun Gro) in October of 2002 provided a very real example of the type of claims for third party damages that will face transmission companies, given that they no longer have the ability to protect themselves from third party liability. Sun Gro filed a statement of claim, in the Court of Queen's Bench, against a number of parties, including Aquila Networks Canada Ltd. (Aquila) and TransAlta Corporation[11] (TransAlta). Sun Gro's claim alleges that TransAlta and Aquila were negligent by, among other things, not providing continuous and uninterrupted electric service.

The result of the alleged intermittent disruption of power was a malfunction in Sun Gro's control system leading to the continuous operation of a door which, in turn caused a fire in Sun Gro's plant. Sun Gro claimed, jointly and severally, direct damages for plant and inventory totaling $14,708,372. Sun Gro further claimed $12,605,605 for consequential damages.[12]

TransAlta also pointed out legislative liability limitation does not expose end use customers to financial risk through tariff-based indemnification of upstream participants necessary to make the electric system function.

All the Service Providers, with the exception of ATCO Power, recommended that the Board convey to the government that the legislative option was the best approach. AltaLink provided examples of the protection offered in some US jurisdictions.

Absent government action with respect to a legislative solution the Service Providers recommended a tariff/indemnification approach as the most comprehensive action open to the

[11] Court of Queen's Bench Action No. 0203-18644, Sun Gro Horticulture Canada Ltd. dated October 1, 2002.
[12] *Ibid.* at paragraphs 21-22.

Board to itself effect. ATCO Power noted that such a tariff approach would have to involve amendments to the tariffs of the TFOs and DISCOs as well. A number of the Service Providers provided suggested tariff language. The Board does not consider it necessary to repeat these suggestions in detail here however. Some of the Service Providers, including EPCOR and ATCO Power, questioned whether the Board had authority to limit liability. Aquila stated that it did not object to the use of the Terms and Conditions of the Distribution Tariff to effect liability protection to TFOs or ASPs, if it is determined that this is the appropriate vehicle, and if doing so had no adverse effect on Aquila, either financially or otherwise.

EPCOR explained that one of the major problems with the current situation is that with the restructuring of the industry, TFOs, ASPs and PPA Owners no longer have a direct contractual relationship with end-use customers as they did when their functions were part of a single, integrated entity. As such, there is no "privity" of contract between these service providers and other market participants, including end-use customers, by which these service providers can protect themselves contractually from liability to these parties with reasonable certainty. ATCO Electric made the same point.

ATCO Power agreed with EPCOR, noting that despite the Indemnity Agreements contemplated by Decision 2003-059, there remain significant gaps in the coverage of parties who provide the AESO with Ancillary Services. It was ATCO Power's position that:

> the agents, officers and employees of ASPs should be afforded express liability protection;
>
> those persons who indirectly provide ancillary services, such as where a PPA owner makes a PPA unit available, should be afforded express liability protection (and their agents, officers and employees).[13]

ATCO Power provided an analysis of case law with respect to privity of contract and the effectiveness of tariff approaches.

The arguments of the Service Providers tended to largely repeat the points raised in the original submissions of the parties. TransAlta explained the evolution of liability protection, noting that customers' relationships in the integrated utility era were limited to their local monopoly utility. While all took the benefit / burden of the EEMA regime in respect of province-wide generation and transmission costs, from a customer perspective, EEMA was only a financial item in their local utility's cost of service, and the customer had no direct relationship with other EEMA participants. Thus, there was no particular focus on making reference to other participants in the market in the T&Cs of the serving utility.

As industry restructuring and market disaggregation proceeded, the LPR (see Attachment A to EPCOR-AESO-01) was framed to provide liability protection to those designated (including power pool persons and transmission persons) against claims that any person may have, regardless of whether a direct relationship existed between those persons and a potential claimant.

[13] ATCO Power notes that TFOs have taken the position that they should be covered as well and, while ATCO Power does not object to this approach, does not intend to address this matter in its evidence.

The LPR also:

1. Recognized specifically that the acts of the protected persons were carried out by individuals, and provided express protection for such individuals;

2. Provided liability protection exceptions in respect of non-individuals in terms of willful misconduct, negligence or breach of contract; and

3. Provided a liability protection exception in respect of the individuals limited to an act not carried out in good faith.

While the exact terminology defining direct, as contrasted to indirect or consequential, damages may have varied among utilities' T&Cs, and as between utilities and the Liability Regulation, the intent to limit exposure to direct damages in defined circumstances remained constant.

The provisions of the EUA (S.A. 2003, c. E-5.1, s. 90) retain essentially the same protective structure, in respect of the Independent System Operator, the MSA and the Balancing Pool, both as individuals and as corporate entities. The correspondence around similar protection for other market participants in the disaggregated industry (see the attachments to BR.TAC-1) centred on the optimal method(s) of providing such protection, not whether such protection should exist.

AE explained how the "old world" worked, stating that prior to industry restructuring, service was generally provided to customers by integrated utilities that were engaged in generation, transmission, distribution, and retail functions. The "single entity" utility was responsible for providing all aspects of these services to end use customers, although customers typically took service from their distributor. In this environment, the lines of the relationship were straightforward and clear. There were integrated utility service providers and there were customers. These parties had a "direct relationship" and customers looked to the integrated utility for the provision of all functions needed to ensure that the electricity was delivered to their door by "their utility".

In this environment, the regulated Terms and Conditions of Service provided an effective means to govern the relationship between an integrated utility and its customers. These Terms and Conditions constituted an imputed "contract" that the customer would look to for its rights and obligations vis-à-vis the integrated utility. AE stated customers would not typically look beyond "their" service provider for any relief they felt due, based on circumstances encountered with the provision of electric service. The lack of legal actions during this era against the integrated utilities, particularly those seeking indirect or consequential damages, illustrated the effectiveness of this regime. As such, during this period, legislative protection was not even broached as a requirement. The Board approved Tariffs effectively provided sufficient protection to shield the integrated utilities from exposure to liability for indirect or consequential damages.

With respect to the potential of insurance being a viable option TransAlta noted that the AESO's own investigation of insurance availability came to the conclusion that "substantial coverage is unavailable in Canada" (BR-AESO-06). Similar conclusions were reached by AltaLink (FIRM-ALTALINK-Liab-5), ATCO Electric (BR-AE-01) and EPCOR Utilities Inc. (BR-EPCOR-01). Each party who investigated and provided evidence regarding the potential of insurance as an option came to the same conclusion – insurance is simply not an option. Accordingly, TransAlta maintained the so-called insurance option should not form any further part of meaningful

discussion, as all investigations prove it to be an illusion as far as indirect and consequential damages are concerned.

EPCOR also stated that it had approached the insurance market and determined that there was insufficient capacity to underwrite the risk from losses of an indirect, special or consequential nature resulting from service interruptions.

ATCO Electric expressed its concern with S. 90, stating that under today's legislation there was inadequate protection for industry participants such as TFOs, ASPs, and PPA Owners. Subsection 90(2) of the EUA provided that no action lies against an Independent System Operator (ISO) person, and an ISO person is not liable, for an ISO act.

AE maintained the debate surrounded the scope of the legislative protection afforded by the above referenced provision. At best, the coverage is uncertain as it related to TFOs and relied upon an interpretation that was by no means clear. At page 3 of the AESO's evidence, dated July 30, 2003, the AESO submitted that the legal liability protection under the legislation is applicable to ASPs, Black-start Service Providers (BSPs), and TFOs when they are performing ISO acts. Specifically, the AESO believes that such entities are agents or contractors of the AESO, as those terms are used in the legislation. AE noted, however, that the AESO acknowledged the shortcomings in this argument and agreed that resolution of the matter via legislation is the preferred option (page 7 of the AESO's Evidence, dated July 30, 2003).

AE was of the view that it would be imprudent to rely on such an interpretation of the legislation absent final determination by a court of competent jurisdiction. The Act does not explicitly state that TFOs, ASPs, or BSPs are contractors of the ISO, or that the provision of either transmission services or ancillary services constitutes an ISO act. As a result, there is considerable uncertainty regarding the existence or extent of liability protection for these parties. AE stated this was particularly so given that TFOs are legally mandated, pursuant to statute, to provide service to the ISO. ATCO Electric's concern was exacerbated by the fact that the Department of Energy has recently refused to provide explicit legislative protection to TFOs and has indicated that section 90 of the EUA was not intended to provide liability protection to TFOs. It would therefore be unwise, according to AE, for ATCO Electric and other TFOs to rely upon such an uncertain interpretation of the legislation.

AE noted that Miltom Consulting, retained by the Department of Energy to perform an independent assessment of this issue and to make recommendations regarding liability protection of market participants, concluded that the liability of certain participants, including TFOs and ASPs, should be limited to losses resulting from negligent conduct, bad faith, or willful misconduct and that damage should be limited to direct damages. Miltom also recommended that, at minimum, directors, officers, and employees should be protected from losses resulting from negligent conduct. It also concluded that recovery for losses from acts of bad faith or willful misconduct should be limited to direct damages. Miltom reasoned that the entities to which individuals were associated would remain liable for the conduct of its individuals, thereby satisfying any damages awards, and that the individuals would have neither the financial means to pay damage claims personally nor the ability to obtain significant personal liability insurance coverage.

AE noted a legislative solution that would bar actions against TFOs, ASPs, and PPA Owners would be a clear and complete answer to the issue. There would be no debate over the scope or

enforceability of the provisions or their application to each specific factual circumstance underpinning a potential claim. There would be no argument over possible exceptions or relevance of precedents. There would be no requirement to provide for a costly indemnification procedure, which cost would ultimately be borne by customers. In short, AE maintained resolution of this matter via legislative amendments would clearly address this complex and controversial issue and provide a fair and equitable solution entirely consistent with the overall public interest.

AltaLink noted that a similar situation had arisen in the US. In the United States, prior to restructuring, state regulatory agencies generally approved tariffs that limited the liability of integrated utilities. In December of 1999, the FERC issued Order 2000, which interposed RTOs and ISOs between the TFO and the end use customer in a manner similar to the AESO in Alberta. In both cases the contractual privity between TFO and end user has been broken.

Because U.S. TFOs are under the control of an ISO or an RTO that is under FERC jurisdiction, the state tariffs are no longer effective at limiting the TFO's liability. The FERC stated in its White Paper on the Wholesale Power Market Platform, (White Paper) that it would be taking steps to address this serious issue. AltaLink stated the following excerpt from the White Paper described how the FERC intended to incorporate liability protection into its final rule:

> The Final Rule would include standardized tariff provisions that limit the liability of RTOs and ISOs and transmission owners that belong to RTOs and ISOs. The tariff would provide that they would not be liable for any damages arising out of ordinary negligence. In instances of gross negligence, the RTO or ISO or the transmission owners that belong to RTOs or ISOs would only be liable for direct damages, and not for consequential or indirect damages. The same protections would also apply to generators when they are implementing the directives of the RTO or ISO. Courts will determine whether an action is negligent or grossly negligent.[14]

CMH commented from the perspective of a Black Start Provider (BSP). CMH stated that it had withdrawn these services as of June 1, 2003 due to its concern over exposure to liability. CMH noted that the LPR provided specific protection for BSP, stating that it precluded any action against the BSP for both direct and consequential loss or damage except in the special case of breach of contract.

Any perceived inadequacies in liability protection under the Regulation were covered off through contractual arrangements with the TA. For example, although the amended Regulation did not provide protection in the event of breach of contract, these contractual arrangements capped the CMH's exposure to an amount which was deemed acceptable.

CMH submitted that immunity from liability is required for BSPs which provide their services, on a "reasonable efforts" basis to assist in restarting generators which have stalled or failed and at a time when catastrophic events might otherwise occur.

CMH stated that the protection offered in the new world by S. 90 was inadequate as it was not certain whether CMH would qualify as an agent or contractor, it did not cover employees nor was the protection offered extensive enough for BSP.

[14] FERC White Paper, Wholesale Power Market Platform, Appendix A, issued April 28, 2003

CMH also noted the comments of Miltom:

> it would be appropriate for black starters to receive full immunity for the continuation of outages resulting from their inability to restart the system due to negligence, willful misconduct and bad faith. Absent such protection there may be no black starters.

CMH agreed with the other Service Providers that legislative protection was the best option, noting that lack of privity of contract would severely hinder the effectiveness of a tariff solution.

EPCOR recommended that the Board not make any determination with respect to the application of S. 90 of the EUA. EPCOR noted that the problem was one of uncertainty. S. 90 does not state that ASPs or TFO are contractors of the AESO. The situation facing PPA Owners is even less clear. Such uncertainty would remain until a court such as the Court of Appeal provided a judicial interpretation of S. 90.

EPCOR continued to recommend a legislative solution and that the Board should recommend this in the strongest terms to the Minister of Energy.

If a legislative solution was not forthcoming EPCOR recommended a tariff solution and offered a number of specific recommendations with respect to this option, starting at P. 3 of their argument. These solutions primarily involved amendments to the T&Cs of the AESO, DISCOs and TFOs. EPCOR did not, however, recommend that DISCOs indemnify TFOs. EPCOR suggested that Riders B or C could be used to address the liquidity issue.

ATCO Power continued to advocate a legislative solution but read the evidence filed by the parties as an endorsement that the Board ought to pursue a tariff solution immediately and not wait for legislative intervention. ATCO Power therefore recommended that the AESO and other service providers under the Board's jurisdiction should be directed to implement tariffs, which will conform with the principles to be established in this proceeding. The AESO would further be directed to implement tariffs, which would prescribe the necessary changes to the tariffs of all persons who provide electricity service to end-users. Further, an indemnity, which addressed the gaps in liability protection, would be provided, as described in BR.AP-3.

ATCO Power noted that the AESO considered it just and reasonable that officers and employees of ASPs be protected. AP stated it was reasonable to expect agents and contractors of the ASPs to expect protection for their operations. AP explained that in a typical generation facility, there are often co-venturers, project lenders and partners who might be exposed liability under certain events. If the ASPs themselves are to be afforded liability protection, and if it is considered appropriate that such ownership structures be permitted in the generation business in Alberta, it was submitted that liability protection should also cover joint venturers, partners and project lenders in generation projects.

AP also suggested that with respect to direct losses a limit or cap would be appropriate in cases other than willful misconduct, given the uncertainty over the distinction between indirect and direct losses and the potential that direct losses might be ruinous for any single generator. AP submitted that this cap on liability should strike a reasonable balance between imposing economic discipline on the actions of ASPs, on one hand, and limiting exposure for damages to a reasonable amount, on the other. AP proposed that this cap on liability be extended to directors, officers, employees, agents and representatives of ASPs, joint venturers and PPA Owners, for

any particular occurrence. This cap on liability for both consequential losses and direct losses would be included in the tariffs of the AESO as well as the tariffs of all persons who provide electricity services to end-users. For discussion purposes AP suggested a cap in the amount of the last six months revenues received by the ASP from the AESO for ancillary services would seem to strike such a balance.

While not advocating that the Board finalize tariff amendments in this decision, AP did submit the following principles for the establishment of a tariff solution:

- The AESO should amend its tariffs to provide that all persons who provide distribution access service shall, as a condition of receiving service from the AESO, include the principles set out in the decision in their tariffs, distribution access services, failing which the person shall be jointly and severely liable with the AESO for any indemnity obligations applicable to the AESO under article 14.

- Providers of ancillary services who are covered by the limitation of liability in the tariffs would include indirect providers, such as PPA Owners and generation facility co-owners, joint venturers and project lenders in generators providing ancillary services.

- The tariffs should limit liability of providers of ancillary services, their directors, officers, employees, agents and representatives from liability for all damages other than direct loss and damage suffered by Customers as a result of negligence or willful misconduct of the ASP.

- The tariff should clearly confer the benefit of enforceability on the class of persons represented by the ASPs and other commercial participants, as well as their directors, officers, employees, agents and representatives.

- The tariff should clearly confer the benefit of enforceability against a broadly defined class of "Customer", including third parties who use the electricity supplied to the Customer (e.g., tenants) and former Customers.

- The tariff should provide for a cap of liability for all damages suffered by customers and other third parties, other than damages arising from the willful misconduct of the ASP, from any single occurrence.

- The indemnity provided for in Article 14 would be amended as provided for in BR.AP-3.

In reply TransAlta, in view of the overwhelming support for protection being afforded to directors, officers, employees, agents and representatives of the corporate entities involved, urged the Board to extend, at the earliest date possible, coverage in tariff provisions to all such entities and their directors, officers, employees, agents and representatives.

With respect to whether indemnification should be for consequential loss, direct loss or all loss TransAlta stated its investigation of the potential to insure revealed that no insurance was available in respect of third party claims for indirect or consequential losses. A cap, rather than a statutory or tariff-based prohibition in respect of pursuing such claims, was thus not an optimal solution, since the residual risk could not be reasonably dealt with, except by an indemnification in the tariff financially backed by customers.

As to direct damage claims by third parties, TransAlta's insurance investigation indicated only limited and expensive coverage is available. In such circumstances, review of the costs and availability of insurance, combined with the imposition of a cap at some level, could lead to a feasible result. TransAlta would accordingly support those who suggest a cap in such circumstances, as a reasonable balance between accountability and risk mitigation.

TransAlta noted that FIRM (paragraph 31), in respect of those providing Ancillary Services indirectly through Watt-Ex, suggested reliance on the notion of an "imputed contract". TransAlta stated FIRM offered no case law to support such a concept. The concept would be that a court, in a damages case some time in the future, should be assumed to surely accept the proposition that "if A has a contract with B to provide services to B, and B in turn has a contract with C to provide services to C, and B relies on A to fulfill its contract with C, then A thereby becomes an agent or contractor of C." TransAlta submitted the absence of case law proffered in support of such a proposition may suggest why such a proposition has not been acceptable to date to those ASP's who withdrew or are considering withdrawing from the ASP market.

TransAlta commented at length upon FIRM's suggestion that recent Supreme Court of Canada case was also a sufficient answer, stating it was premised on a general extrapolation of that case to the context of the issues before the Board in this proceeding. TransAlta submitted the *Fraser-River* case analysis provided by FIRM couldn't be taken as necessarily relevant to the issues in this proceeding.

TransAlta was also critical of the AESO's proposal to have the Board offer an interpretation of S. 90, stating:

> The AESO's suggestion (paragraphs 3.10 and 3.12) of a Board interpretation of section 90, followed by a Court of Appeal proceeding, has too many potential shortcomings to be an efficacious solution to the immediately pressing issues before the Board. What assurance is there that a party would launch an appeal? – the AESO itself has indicated that it is unlikely to do so (TAU-AESO-05(ii)). Might not parties who wish to see liability remain unlimited prefer to wait until a claim eventuated, and then take it to the courts on the particular facts of that claim? Would the grounds upon which leave might be granted in any appeal process from the Board be broad enough or the appropriate ones to instill sufficient confidence in the ASP market to remove reticence to participate? And, how long would all that take, while the market continued to languish in uncertainty? It is perhaps for these reasons and others that the AESO itself acknowledged that tariff-based protections needed to be continued pending expanded protections via regulations.[15]

IPPSA noted that other parties, such as AP, suggested the Board should not advocate a legislated solution.

In their submission this was incorrect. If the Board identifies a component of the industry structure which it views as needing clarification in order to protect the public interest IPPSA maintained the Board responsibility is clear -- that is to promote the public interest and seek the clarification required.

[15] TransAlta reply, Page 7

Accordingly if the Board determined that it was in the public interest to extend liability protection to ASPs (inclusive of black-start service providers and TFOs) then it should do just that. If this means a recommendation to government and an interim tariff solution IPPSA stated these options should be pursued.

AltaLink replied to FIRM's claim that an indemnity provided by the AESO would have the unintended effect of providing even greater liability protection for industry participants than that enjoyed under the Terms and Conditions of Service (T&Cs) prior to industry restructuring.[16] FIRM's assertion relates to the historic ability of "third parties or non-customers", as opposed to a utility's own customer, being able to bring a claim against a utility. AltaLink stated that although this assertion may be technically correct, due to the fact that prior to industry restructuring there was no limitation of liability for non-customers, the practical reality is that the risk related to a non-customer claim was negligible because the non-customer would have been located outside of the utility's service area and would not have been directly reliant on the utility's services. Any party within the utility's service area would have been a utility customer and thus precluded from claiming pursuant to the utility's T&Cs. AltaLink now found itself in the position of being a stand-alone entity that faces exposure to claims from non-customers located within its own service area, as well as non-customers located outside of its service area. AltaLink submitted the degree to which an AESO indemnity will provide a TFO with additional liability protection, if any, was negligible.

Also in response to FIRM's arguments, EPCOR reiterated that it is the fact that service providers operating in the restructured electricity industry cannot effectively manage their liability through their tariffs and contracts, rather than the absence of historic statutory protection from liability, that is of most relevance to this proceeding.[17] To the extent that an indemnity from the AESO relieves a service provider from liability to which it would not have been exposed in the "old world" by virtue of its terms and conditions of service or contracts, EPCOR maintained the indemnity did not truly expand the liability protection that the service provider enjoys.

AltaLink also noted that IPCAA had asserted that the "old world" of liability protection is no longer relevant and that the TFOs are attempting to push the cost of a utility's negligence onto customers.[18] IPCAA was incorrect; the "old world" is still relevant to the decisions made today because those decisions are in respect of transmission system investments dating back to the time when liability protection existed. AltaLink pointed out utility rates of return on those investments have always and continue to assume a level of risk commensurate with a regime that provides for TFO liability protection. AltaLink also noted that TFOs were required to provide service and as such were not able to simply exit the business as suggested by IPCAA.

ENMAX sympathized with FIRM's concern that the loss of one or a few customers should be shifted to all customers but claimed that a legislative solution was the only one that would avoid this as any tariff based solution would require an indemnity as a backstop and the consequent cross-subsidization that could come with it.

ENMAX also reiterated that customers were in the best position to evaluate their risk of loss and to mitigate that loss, either through insurance or other means. The Service Providers had limited options to mitigate the risk of consequential and indirect damages.

16 FIRM Argument, paragraph 6
17 EPCOR Argument, page 8
18 IPCAA Argument, page 2

CMH, from the perspective of a BSP, again pointed out that the legislation does not specifically reference BSP and protection does not extend to officers, directors or employees. CMH agreed with EPCOR no useful purpose would be served by the Board providing its interpretation of Section 90 since it will not be binding on courts in any subsequent liability proceeding and, apparently, will not provide the level of comfort required by service providers. Rather, CMH stated it would be more appropriate for the Board to indicate that there is considerable uncertainty as to the liability protection provided by the Act and, as a result, it would be appropriate for the government to consider implementing appropriate liability protection regulations, as contemplated in Sections 94.

AP noted, in response to FIRM, that under its proposal, the indemnity is a secondary provision, which would only be called upon if the tariff solution proves ineffective. Given the FIRM Customers' endorsement of the feasibility of the tariff approach, the indemnity can reasonably be regarded as not likely to expand exposure beyond the state of affairs that existed before restructuring, particularly given that customers do not bear the burden of the "regulatory bargain" over the entirety of an integrated utility as a result of restructuring. Further, ATCO Power's proposal is that the cap applicable to recovery for direct losses would not be reflected in the AESO's indemnity.

With respect to CMH's request for complete protection AP stated it was not logical to immunize BSPs from any exposure to direct losses, on one hand, and, expect that ASPs should be exposed to unlimited amounts of direct losses, on the other. As ATCO Power has followed the events of the August blackout, it does not appear that any BSP has been initially identified as exposed to liability. In certain circumstances, an ASP could be exposed to enormous liability, to the same extent as a BSP, in respect of direct losses. Indeed, by the time a BSP is involved, the proximate cause of the incident would have already occurred.

Further, while ASPs may receive more payment than BSPs over a period of time, this was not necessarily the case, depending upon how often an ASP is called upon by the AESO. Exposing an ASP to unlimited liability in respect of direct losses may well be equally unreasonable. A cap on damages for direct liability referable to revenues over a period of time would introduce commercial reasonableness for both ASPs and BSPs.

At the same time, AP maintained it may be considered useful to give BSPs some commercial incentive to avoid being negligent. Exposure to a capped amount of liability would provide BSPs and ASPs alike with a measured amount of commercial discipline.

The ASTC Partnership supported AP, stating that that the cap on direct liability recommended by AP would further facilitate market participation and supported the TransAlta view that "it cannot be taken as an ongoing parameter that direct damages should be open for claiming in an unlimited manner from industry participants".[19]

AP continued to maintain that it was not necessary for the Board to recommend legislation to the government, stating the most serious problem with the AESO's proposal to send a report to the Government which identifies all of the problems is that, after a time lag, the Government may or

[19] TransAlta submission, page 7

may not respond. The Government may or may not address all the problems. There is no assurance that the Government will address any or all of the problems in a timely fashion.

The better way is to note in the Decision that the parties prefer legislative solutions and in the absence of legislation or until a regulation is enacted the Board is taking steps to implement a tariff solution and amending the indemnity.

AE noted the AESO and FIRM submitted that section 90 provides liability protection to ASPs and TFOs when providing services to the AESO. IPCCA submits that section 90 protects ASPs, but *not* TFOs (except to the extent they provide ancillary services). In support of their position, the AESO, FIRM, and IPCAA refer to recent correspondence from the Department of Energy indicating that section 90 was intended to afford liability protection to ASPs and TFOs and others who contract with the AESO to provide services. Unfortunately, this correspondence does not provide any level of comfort to AE and other parties, not only because it was not binding on the Board or, more importantly, the Courts, but also because the Department of Energy's previous correspondence advised industry participants that it did *not* support extending liability protection to ASPs and TFOs. In fact, AE noted the legislation does not expressly cover these parties and this created considerable uncertainty regarding how the legislation would be interpreted if a challenge were initiated.

Views of the Cities

The Cities stated that while their tariffs were not currently approved by the AEUB, the Cities are parties to contracts with the AESO with respect to the use and operation of their facilities, and are subject to indemnity and liability protection provisions. The Cities therefore have an interest in the liability and indemnity issues before the Board from at least two perspectives:

- They face exposure from third party claimants with respect to failures of all or any portion of their transmission system, which may result in failure of supply outside their service area boundaries.

- They are concerned about the ultimate costs of liability and indemnity proposals that must be borne by them as customers of the AESO, and ultimately borne by their end-use customers.

The Cities maintained that their review of the evidence has made it abundantly clear that there is a requirement for the EUB to immediately intervene with an appropriate tariff condition, notwithstanding the consensus that this is a second best if not second rate solution. The Cities maintained that with increased exposure and risk, it appeared that ultimately the customers of the AESO and the end-use customer will see increased costs arising from the necessity of purchasing in one form or another protection or from the withdrawal of otherwise willing suppliers from the market. Neither result was in the best interest of electricity customers.

The Cities stated that it was apparent that third party indemnity protection was either unavailable or extremely costly. The exposure was unpredictable, unknown and unmanageable without the liability protection sought in this module. Without any economic availability from the insurance market, the only remaining resource is customers. The Cities submitted that given the unknown, unpredictable and unmanageable liability, this was not a burden customers in general should have to bear. Equally, it was not a burden that suppliers should have to bear given the obligation to supply wires service. The Cities submitted that is why, historically, and prior to restructuring,

failure to supply in the absence of negligence (otherwise a breach of contract), and consequential damages were not grounds for recovery from utilities.

Since it appears that liability protection was warranted, the Cities agreed with the representations made by parties submitting evidence that the best solution is legislative protection. Legislative protection should be extended to all suppliers of necessary services for the safe and efficient operation of the electric system, including TFOs, ASPs and PPA owners. However, if that is not likely or complete enough, the EUB should impose tariffs that provide protection, including protection from third party claimants. The Cities were further of the view that such protection should extend to officers, directors and employees subject to similar restrictions that apply to municipal employees.

The Cities were of the view that the tariff should contain a condition that excludes recovery for consequential damages, from any party supplying electricity services, although, if such damage is ultimately recoverable because of problems with the tariff based solution described in some detail by parties submitting evidence in this proceeding, there needed to be indemnity protection for such damage.

However, given that a tariff-based solution ought to exclude consequential damages, and the uncertainty of the exposure, indemnification from customers (from whom this will eventually come) should be subject to a deferral account mechanism. There should be no insurance or reserve account.

With respect to S. 90 the Cities agreed that the extent of the protection provided by Section 90 is not sufficiently clear to avoid the uncertainty that suppliers to the Alberta electric system complain of, and which, in the view of the Cities, unnecessarily exposed customers to extra cost.

However, in order to press for a broader legislative protection, it will be necessary to establish that the current section is not broad enough. In the Cities' submission, therefore, the AEUB must at least determine in this proceeding what Section 90 means and the extent of the protection offered by it. Therefore, the Cities submitted that in this process the AEUB should make a determination of the meaning and effect of Section 90, and if it determined that there are gaps, what those gaps are, and why they should be removed. In that regard it is important that the nature of the risk and the effect on customers should be detailed. In the result, the Cities submitted that the AEUB should in the final result make a recommendation to government that the gaps, if any, be closed, in the public interest.

Should a legislative solution not be forthcoming the Cities recommended as an interim solution, and final if need be, the imposition of terms and conditions in tariffs which would provide liability protection with respect to failure of supply and consequential damages as against claims from any injured party.

This solution clearly has at least some prior historical support, and notwithstanding the concerns expressed by one or more parties, the Cities were of the view that there is legislative support for the AEUB to exercise jurisdiction to impose such terms in a tariff. Further, as a practical matter, there is no downside to imposing such conditions and a considerable upside should the pessimistic views expressed by a number of parties with respect to the tariff solution not come to fruition. However, as recognition of those views, clearly indemnity protection must also be included.

With respect to the argument that there are municipal utilities not currently regulated by the Board (the Cities being the prime examples), while their distribution rate and utility operations are not subject to regulation by the AEUB, the practical fact is that indirectly they are subject to the EUB's direction through terms and conditions imposed with respect to DTS service, and are parties to contracts with the AESO which are supervised by the AEUB. The Cities did not see this as a "gap" which would impede the use of a tariff based solution that will apply to all customers.

In reply the Cities were critical of the arguments of IPCAA. The Cities noted the first "theme" IPCAA attacked was the fact that TFOs were protected in the old regulated world from being accountable for negligent actions. In stating the theme the Cities maintained IPCAA misrepresented the old world scheme. The protection provided was from liability for consequential damages. The regulated utility was still at risk for direct damages attributable to negligent acts.

As an initial observation, the Cities noted that transmission service continues to be an old world regulated monopoly industry subject to the obligation to serve. TFOs cannot decline to provide service to the AESO in order to control their exposure. Therefore IPCAA's observations with respect to the first theme were of little relevance. If anything the Cities maintained there was enhanced reason to provide the requested protection, because of the proliferation of participants and the reduction in the ability of any one party to exercise control of the system (which is identified by IPCAA in its argument).

The Cities also noted legislation and tariffs by definition may deprive individuals of common law rights where there are greater public interest goals. Therefore, merely stating that it constitutes an interference with common law rights is of little weight. For the most part, the Cities maintained customers agreed with such restrictions because they were sensible and represented a proper balancing of risk. The right that IPCAA sought was a restoration of rights that its members have not had for a considerable period of time and the Cities submitted that IPCAA has not advanced a convincing reason to do so.

The Cities stated the second theme that IPCAA attacked was the position of the parties that electricity is not a guaranteed commodity and exposure to damages is unreasonable and unfair. IPCAA claimed that this has nothing to do with negligence. The Cities maintained the problem with IPCAA's statement was that it represented an unrealistic approach to the tort system. The likelihood of defending an action based on accident is becoming increasingly rare in the courts. Therefore, the Cities stated there was significant exposure and it is, based upon the evidence, exposure that cannot be effectively managed against. In the result, the customers will pay, and if they do not pay, the TFOs will not be in business. The Cities maintained this was a reality and clearly provided a public interest reason to provide the liability protection.

The Cities also noted IPCAA's comments on insurance. The Cities stated that insurance is simply not available. The Cities also noted IPCAA has argued that the proposal to provide protection is not fair and balanced. The Cities submitted that there is no such thing as perfect equity, but that the proposal does protect TFOs and the entire group of customers from a risk they cannot manage, and leaves it where it has always been - with end users who can manage it. The fact is that end-use customers know what their risk is, and what they are prepared to bear and at what cost. They also know what they can do to mitigate their own risk exposure to both

direct and consequential damages. All of that information is relevant to both the decision to place insurance and the cost of it. The Cities claimed that information is not available to the TFOs and therefore they face the challenge of placing insurance with respect to an unknown risk for unknown amounts, which they cannot manage. This is not a favourable underwriting situation. The Cities submitted the risk has been shifted in the past because it was the most logical and cost effective method of doing so.

The Cities noted another theme IPCAA attacked was that protection should be provided because TFOs have an obligation to serve. IPCAA's response was that does not give them a license to be negligent. The Cities maintained no one suggested that it should, but the reality is that consequential liability can be catastrophic and either the TFOs' shareholders or customers will bear it. In the Cities view IPCAA has not presented any convincing argument that the proposed solution is not in the public interest considering the various stakeholders. The Cities termed IPCAA's view that TFOs who do not want the exposure can simply leave the business as an irresponsible approach to a real and significant problem.

Views of FIRM

FIRM noted that an issue not raised in the evidence filed to date is whether the provision of liability protection requested by some of the parties, specifically indemnification through the AESO, will result in greater liability protection than that enjoyed by the market participants prior to industry restructuring. Prior to industry restructuring, while customers could not advance a claim for consequential loss or damages arising through breach of contract, FIRM noted it was still open to third parties or non-customers to bring a claim for consequential or direct loss, if they suffered the losses. Therefore, should the AESO continue to indemnify market participants, it had the unintentional effect of granting greater protection than that previously enjoyed by the integrated utility.

FIRM submitted it is not and was not the intent of the legislators nor of industry restructuring and deregulation to provide a greater protection to regulated utilities at the expense of customers.

FIRM claimed the potential exposure of TFO's and Ancillary Service Providers (ASPs) is dependant on the interpretation of s.90(c)(iv) of the *EUA*. If s.90(c)(iv) is interpreted according to its plain meaning as FIRM and the AESO submit it should be, TFO's, ASPs, including BSPs, who provide services to the AESO, are "contractors or agents" of the AESO. Therefore, there is no liability exposure for those entities. The June 13, 2003 and August 7, 2003 letters from Alberta Energy supported this view. FIRM submitted the potential exposure of TFO's and DISCOS to third parties, for consequential loss or damage, can be mitigated appropriately by properly worded T&Cs.

FIRM maintained that in reviewing the evidence filed here, FIRM agreed with the AESO that Part 5 of the *EUA* provided legal protection against liability to ASPs (including BSPs), and TFOs. In short, most of the parties agree that there is some sort of contractual relationship with the AESO. AltaLink contracts with the AESO by way of its T&Cs.[20] ATCO Electric admits to having an imputed contract with the AESO by virtue of the T&Cs and acknowledges that "agents and contractors" of the AESO are protected against liability by Part 5 of the *EUA*.[21] TransAlta acknowledges it provides services through Watt-Ex, which has a direct contract with the

[20] AESO-AltaLink(AL)-01
[21] AESO-AE-01

AESO.[22] Again, this is another contractual relationship. EPCOR declined to state whether ETI and EMC contract with the AESO,[23] although it previously asserted that EPCOR is a TFO, via ETI and provides ancillary services to the AESO, directly and through Watt-Ex, via EMC.

FIRM submitted most of the parties seem to agree that the customer is best able to manage its liability risk or appetite. If a customer wants insurance or a self-generation alternative then it can do so at its own cost. The potential loss to one or a few customers should not be shifted to all customers, which FIRM maintained is the direct result of an indemnity granted by the AESO.

FIRM further submitted the liability protection that should be implemented, is a tariff-based approach, specific to the T&Cs of the AESO, the TFO's and the DISCOs. Such protection should be extended to agents, employees and officers as well. This was the only practical solution, barring clarification by the Alberta Government of the liability protection already granted. Further it did not change the historical risks faced by customers. FIRM also noted that the Board could render a decision with respect to the interpretation and applicability of S. 90.

FIRM claimed this above approach would provide the same degree of liability protection that previously existed. FIRM submitted that indemnification by the AESO was not a reasonable or feasible option due to the difficulty in assessing risk, the potential impact on customers, the fact that the costs of indemnification are uncertain and practically impossible to prepare for, and ought not now be borne by customers who have traditionally been responsible for their own protection against indirect loss.

FIRM submitted the jurisprudence regarding "privity of contract," allowed for a tariff-based solution to occur. Adequate protection can be provided to a TFO or ASP or even PPA owners by incorporating appropriate wording in the T&Cs of the contracts between the AESO and the DISCO's and the end use customers. FIRM stated T&Cs were used and relied upon in the past and can be used and relied upon in the future.

FIRM noted there was recent and very persuasive authority from the Supreme Court of Canada (SCC) that changed the strict application of the doctrine of "privity of contract". Specifically, the 1999 decision from the SCC in *Fraser-River Pile Dredge Ltd.* V. *Can-Dive Services Ltd.*[24] outlined a principled exception to the common law doctrine of privity of contract. Generally, the doctrine of privity of contract provides that a contract can neither confer rights nor impose obligations on third parties. The SCC exception to this general rule is based on meeting two requirements:

(i) The parties to the contract must have **intended** to extend the benefit to the third party seeking to rely on the contractual provision; and

(ii) The activities performed by the third party seeking to rely on the contractual provision **must be the very activities contemplated** as coming within the scope of the contract in general or the particular provision of the contract.

To circumvent the privity of contract doctrine, FIRM submitted the Board can and should incorporate wording into the T&Cs of those regulated utilities that have direct contracts with

[22] AESO-TAC.1
[23] AESO-EPCOR-01
[24] [1999] 9W.W.R. 380 (SCC)

end-use customers in order to provide an adequate level of protection to the utilities as a stand-alone entity.

FIRM commented further upon the "privity problem" stating the first prong of the exception to the privity of contract doctrine can be met so long as the parties to the contract (i.e. the customer and the regulated distribution company under its T&Cs) intend to extend the benefit of the limitation of liability afforded to the distribution company to any upstream regulated TFO or ASP. If customers are contractually precluded from pursuing the distribution company for indirect or consequential damages, then it would not be unreasonable to extend that protection to the regulated TFOs and ASPs who are involved in the transmission of the electricity that ultimately benefits or is delivered to the end-use customer.

The second prong can be met as long as the activities performed by the third party TFO or ASP, are clearly defined to include the aforesaid services or "Transmission Services" in the case of a TFO, and these are the very activities contemplated within the scope of the contract between the end-use customer and the distribution company. Amendments would likely have to be made to the distribution company's T&Cs.

In reply FIRM continued to maintain that S. 90 provided sufficient liability protection. FIRM noted the Board had the authority to provide a legal interpretation of S. 90 and that such a legal determination by the Board would allow parties with a significant pecuniary interest to have the matter determined by the Alberta Court of Appeal. This would provide the certainty that some parties have stated is currently lacking respecting the extent of liability protection afforded by S.90 of the EUA.

FIRM continued to oppose the use of indemnity as part of a tariff solution, stating that indemnification by the AESO is not a reasonable or feasible option due to the difficulty in assessing risk, the potential impact on customers, the fact that the costs of indemnification are uncertain and practically impossible to forecast, and that loss ought not now be borne by customers who have traditionally been responsible for their own individual protection against indirect loss.

FIRM noted that related to the issue of indemnity was the assertion found in the Argument of ATCO Power Canada Ltd., which proposes a cap or limit in cases of direct loss other than for cases of willful misconduct.[25] The rationale for the proposed cap arises again from the August blackout. If such a cap is provided, in connection with an indemnity, FIRM submitted it would have the effect of foisting greater losses upon the end-use customer than existed prior to industry restructuring.

In conclusion FIRM submitted that in addition to providing an opinion regarding S.90 of the EUA, the Board should require the AESO to amend its T&Cs in the interim, with amendments that correspond to the level of liability protection afforded by S.90 of the EUA. Specifically, this means that no "cap" is placed upon damages for direct loss. FIRM further submitted that the Board should then require all DISCO's, over which the Board has jurisdiction, to likewise amend their T&Cs. Following the institution of the interim T&Cs, the same could be further considered and reviewed in the next General Tariff Application, where permanent T&Cs could be implemented.

25 Argument of ATCO Power, paras. 20-21

Views of IPCAA

IPCAA was critical of the TFOs, stating that IPCAA has always been prepared to discuss a compromise solution to these problems and in fact had several discussions with Transmission Administrator on possible solutions. The TFO's, on the other hand, have never wavered from their position that they had protection in the "old world", and insurance is expensive, so such protection should continue.

IPCAA maintained that S. 90 clearly provides statutory protection for consequential damages caused by their negligence for ASPs and as such they did not need anything further, including an amendment to the Act. While some of the ASPs have raised some concerns in their evidence/argument, IPCAA submitted the Act, coupled with correspondence from the government and the AESO's legal opinion it was clear ASPs are protected. Simply because some ASPs would like "additional" or "bonus" protection or "clarity" was not a sufficient reason to amend the Act recently put into law, especially where the government fully reviewed the issues before passing the Act. IPCAA stated there was a big difference between "nice to have" and "need to have" and the proper test should be the latter in our view. IPCAA submitted, therefore, ASPs were fully protected in the Act and no further protection is needed.

If additional clarity was needed to include other players in the ancillary services provider chain, like Watt-Ex and PPA owners, IPCAA had no objection, but IPCAA didn't believe it was necessary. With respect to Watt-Ex, given its important role in the ancillary services market, it should receive the same protection as others in the ancillary services chain. IPCAA also submitted TFO's were protected by this section to the extent they are involved in the provision of ancillary services in some fashion.

IPCAA responded to what it termed the general themes of the TFOs in some detail, starting at P. 5 of their argument, as follows:

Theme: "We were protected in the old regulated world, and on an <u>interim</u> basis during transition, so we should be protected in the new world because we are still regulated."

Response: This is not a valid reason to protect parties from being accountable for their negligent actions, which cause damages to others. Responsibility and accountability are key ingredients to the new restructured world and there is no reason to deprive parties of their common law rights to be compensated by a party causing them damages through negligence. The old regulated world of 3 integrated utilities controlling every aspect of the business is very different from the diverse/multi-party system, which exists today. The old world is not relevant anymore.

Theme: "Electricity is not a guaranteed service or interruption free and unplanned outages will occur and the expose TFO's to liability for damages in such cases is unfair and not reasonable."

Response: Nobody, including IPCAA, has ever suggested electricity is a guaranteed service without some outages. These situations are expected to occur in the normal course of business and are covered in contracts, terms and conditions of service, force majeure provisions and common-law and have nothing to do with "negligence".

The only reason we can think of for the TFO's to raise this red herring is to cover up the weakness of their case on the real issue before the Board - responsibility and accountability for damages caused to innocent parties by the negligent acts of TFO's.

Theme: If we are held responsible for consequential damages caused by our negligence we will have to purchase expensive insurance or may not be able to get insurance at all.

Response: We readily acknowledge that the purchase of insurance would not be cheap, but insurance is not the only answer to these issues. It is certainly no a valid reason for legislating the elimination of a party's historical common-law rights. Why should an industrial company's rights be tramped upon to protect a TFO? The problem of insurance costs exists in virtually every industry today, but parties are dealing with this problem in a fair and balanced way, not in a way where one group is protected at the expense of another group. (Even though ATCO amusingly alleges its position of protect ATCO and don't worry about anybody else is the only balanced position put forward).

Theme: We should be protected because we have an obligation to provide service.

Response: What this has to do with the issue under consideration is beyond us. If the suggestion is because TFO's must provide service they should be allowed to be negligent, such a position is remarkable and wrong. This, in our submission, is another red herring. If they don't like the conditions for being in the business they can always exit the business.

Theme: "Our facilities were designed assuming we would get the "protection"."

Response: This statement really stretches credibility, but if the implication is that if they don't get what they want here, the TFO's will spend large sums on additional rate base to protect themselves; the EUB should treat this as the petulant threat it is and simply ignore it.[26]

IPCAA was critical of AE for its position that others should absorb the cost of its negligence. IPCAA stated AE's approach was not balanced and did not fairly recognize common law and the rights and needs of industrial customers. AE's recommendation to industrial customers to obtain business interruption insurance is not an answer to this issue, but rather a means of forcing ATCO's risks onto others. It is also an interesting position when the TFO's found their argument for their "protection" on the high cost of insurance. The suggestion seems to be insurance costs are relevant to TFO's but not industrial customers. This proposition was wrong.

IPCAA was also critical of AE's support of the Miltom report, stating that Miltom is not what one would normally define as experts in this area, but are a bunch of lawyers with some knowledge of restructuring and the law generally and whom the government asked to obtain views and prepare a report. IPCAA claimed they didn't know any more than the rest of us about this issue.

IPCAA stated that the AESO seemed to be retreating somewhat from its original position, at least with respect to the provision of ancillary services, that its legal opinion (from one of

[26] IPCAA argument, page 5-7

Canada's premier law firms) that the Act protects these parties from consequential damages for their negligence. IPCAA assumed this might be due to AESO nervousness because other legal opinions have come forward which differ from theirs. Any complex issue generally resulted in different legal opinions or positions. This is not new and, therefore, should not be a reason for the AESO to equivocate on this matter. Also, the AESO seems to be saying "we are protected, so just adopt the approach which will make life easy for us." IPCAA stated life was not that simple. The rights of all customer groups must be considered.

IPCAA stated that liability protection was not necessary, but if it is deemed necessary by the EUB, it should come through the tariff process. The government of Alberta has already decided not to provide a legislated solution and no new evidence has been presented that should change that decision. IPCAA maintained to change the legislation now would send a very negative signal to any industrial companies considering locating in Alberta.

In reply, as a general comment, IPCAA claimed all ASPs and TFOs are well aware of the position of their allies. However, instead of adopting an efficient and cost effective means of addressing these matters, like FIRM did in filing one common position, TFOs and ASPs chose to play the "numbers" game and file evidence and submissions, which essentially repeated the same arguments. IPCAA assumed the EUB would see through this rather transparent approach and recognize there are basically 3 different stakeholder positions – FIRM, IPCAA and those promoting liability protection – TFOs and ASPs.

While IPCAA did not consider that any further protection was necessary it recommended that if the Board considered a tariff solution the specifics of any tariff solution should be addressed at a GTA proceeding. The approach could be not unlike the ATCO Code of Conduct hearing and the precedent set there. There will be debate regarding wording, and other matters, among stakeholder groups through cross-examination and detailed argument. Additionally, other interveners, who have not been aware of this proceeding, may have an interest in the debate on the particulars, once a determination on this issue has been rendered.

With respect to lawsuits IPCAA noted the AESO, at P. 5 of argument stated "while fewer claims is a good thing, the attendant certainty about how the "next" claim will go cannot be ignored". IPCAA maintained the AESO, in making such a statement, has no concern as to whether a party suffering damages due to the negligence of others should have recourse. This theme of legal claims being inherently bad was contrary to law and fundamental fairness and tended to show an AESO bias on this issue. IPCAA claimed the waving of the "lawsuits" flag seemed to be a bit of a scare tactic here, given the fact outages/problems in our system are very rare events. In fact, even major outages only occur every 40 or 50 years or so, and it should not be forgotten, even in that circumstance, for parties to be successful in a lawsuit they would have to establish the party being sued had a duty of care to that party and that the party was negligent. In summary, IPCAA submitted the concern about lawsuits and uncertainty was overblown and exaggerated.

With respect to implied threats by the ASPs that they may not provide ancillary services unless they get what they want (a very mature approach), the AESO stated:

> Again this uncertainty was not so significant as to have stopped TransAlta or others from supplying system support services through WATT-EX. Today, the AESO procures extensive ancillary services through WATT-EX.[27]

IPCAA believed none of these parties would leave the ancillary services market if a legislative solution is not passed, and none stated that they would, they only implied such action. IPCAA believed they would be more than prepared to accept the protection of Section 90 of the Act, if that is the final decision.

IPCAA was critical of FIRM for what it called buying into the popular proposition of parties best able to manage the risks should do so, claiming that self generation as proposed by FIRM was simply not practical in most cases. IPCAA also criticized FIRM for implying that its members were unlikely to suffer consequential and if such damages are allowed for others, the TFOs will have to purchase insurance, the cost of which will find its way into FIRM rates. IPCAA stated that the issue of "insurance costs", assuming it is the only solution, would be addressed by the EUB at the next rate case of the TFO like any other issue.

IPCAA was critical of AP for stating "Withholding liability protection creates a barrier to entry" and putting on the record the implied threat of withdrawing those services if liability 'continues to be an issue". IPCAA maintained if ATCO was not satisfied with the clear protection of Section 90, then they were welcome to not participate in the ancillary services market. In any event, IPCAA claimed liability protection hadn't been withheld - it was in Section 90 of the Act. IPCAA noted ATCO's suggestion on page 3, Section 10 that "the record ... demonstrates a widespread belief among participants that a legislated solution is the most efficient means to extend the liability protection." This statement is wrong – IPCAA and FIRM (virtually all customers) disagree. Obviously, parties seeking protection - TFOs and some ASPs – agree, but IPCAA stated this could hardly be described as "widespread support". Finally, IPCAA stated that AP and IPPSA had raised the issue of direct costs. IPCAA maintained issues respecting "direct costs" have not been part of this proceeding, nor in government reviews previously held, and the EUB should ignore their comments on this issue.

In replying to the TFOs IPCAA stated it was now clear what the debate was about. It essentially boiled down to what standard of care is owed by TFOs to the system and its customers, and who should manage the risk of TFO negligence. IPCAA maintained the TFOs want to be protected against damages caused by their negligence primarily on the basis insurance for such coverage would be expensive or not available. They also, with virtually no evidence or basic rationale, suggest customers can purchase business interruption insurance to manage their risk. If the approach of the TFOs is adopted, IPCAA submitted they will have made their negligence a customer problem, and will essentially not be accountable or responsible for their negligent acts. This would amount to no real standard of care being owed to customers recognizing that "direct damages" are essentially inconsequential.

IPCAA noted the lawsuit referenced by AltaLink in its argument, stating that AltaLink referenced the Sun Gro versus Aquila and TransAlta lawsuit for damages and negligence caused by Aquila/TAU to support its position that it can't mitigate such a risk. IPCAA maintained the other side of this of course was that a small business should not be without remedy when it is wronged by TFOs simply because TFOs can't solve their own problem of what to do when they

[27] Page 8, paragraph 2.18

are negligent. IPCAA asked - Why should a small business suffer damages caused by the negligence of large utilities and not be compensated? Basically, the TFOs solution to their problem is to pass it to customers on the basis that they can decide how to deal with the "risk" of TFO negligence and obtain business interruption insurance. IPCAA submitted they have provided no evidence or other information on whether such insurance would be available for such an event, costs or other issues.

IPCAA noted that in the articles provided by AP it was reported that only 7% of customers expected to recoup losses either entirely of in part through insurance coverage. Another passage claimed that business interruption claims usually aren't valid unless there is a loss to a company's property and loss of operations <u>for several days</u> – most policies require a loss of operations for more than 24 to 72 hours. IPCAA therefore maintained that business interruption insurance, given the many conditions, was <u>not</u> an economic solution for businesses to protect themselves against damages caused by the negligence of utilities. It is really no easier for customers to manage risk than TFOs, so in IPCAA's view, TFOs should manage their own risks associated with their negligence.

IPCAA also stated that damage estimates and past experience regarding damages, don't remotely approach the Marsh "Study" bought by AltaLink. Also, IPCAA pointed out acts of negligence can occur without a massive blackout causing damages to one, or a small number of, customers, and such events must be addressed fairly from a legal perspective. Referencing this recent event in the east was in IPCAA's view just part of an effort to exaggerate and distort this issue.

However, IPCAA pondered - if First Energy is found to have been negligent and caused this problem, and they had the kind of protection TFO's are seeking, what signal would be sent about responsibility and accountability if businesses suffering losses were precluded from a remedy and First Energy emerges without any real consequences? IPCAA submitted customers are owed a reasonable standard of care from service providers when they suffer damages as a result of that standard not being met, and they should be entitled to compensation.

4 VIEWS OF THE BOARD

4.1 Introduction

As noted by several parties, prior to the enactment of the EUA in 1995, the so-called "Old World" was characterized by vertically integrated utilities providing generation, transmission, distribution and retail service to their customers. In this world, customers had a direct relationship with the utility serving them and the T&Cs forming part of their contract for utility service generally included a limitation on the liability of the utility for damages that might be suffered by the customer as a result of a service interruption. Typically, the utility was protected from liability for so-called consequential or indirect damages, which included such things as business lost by the customer. To some degree, the utility was also protected for certain claims for direct damages. In this Old World, the customer was responsible for protecting or insuring itself against the risk of these types of loss.

One utility might, however, still be exposed to claims from a customer of another utility since the former would not be able to rely on T&Cs in force between the latter and its customer. For example, a generator providing black-start service might cause a power surge that could be experienced in the service area of the owner of a different transmission or distribution system. As

noted by the Cities, any such "crossover" claim would have to have been based on negligence, since there was no contractual relationship between the customer and the utility committing the act.[28]

In the New World under the EUA, the services previously provided by a vertically integrated utility were disaggregated. In some cases services are now provided by entirely separate corporate entities. For example, TransAlta has retained ownership of its generation assets, but has divested itself of its distribution and most of its transmission assets, each of which is now owned by a separate company.[29] In simple terms, there are now many layers in the electricity supply chain. In this environment, the privity of contract necessary for market participants upstream from the retailer to protect themselves directly from legal action by customers has been lost.

In partial recognition of this problem, the Government of Alberta introduced the *Liability Protection Regulation*,[30] which became effective on February 26, 2000 (First LPR). The First LPR protected "power pool persons", "market surveillance persons" and "transmission persons" from liability for any consequential damages and for direct damages if not due to the result of negligence, wilful misconduct or breach of contract (or bad faith, if an individual). "Transmission person" included the AESO's predecessor (the Transmission Administrator or TA), any director, officer or employee of the TA, any affiliate of the TA, and any director, officer or employee of an affiliate. No specific protection was given to ASPs or TFOs.

The LPR was re-enacted in 2001 (Second LPR).[31] In the present context, the most significant change from the First LPR was the addition of the following class of persons to the definition of "transmission person":

> a person that pursuant to a contract with the Transmission Administrator provides system support services to the Transmission Administrator.[32]

This was the first time that liability protection was expressly conferred on ASPs who provided system support services to the TA pursuant to a contract with the TA. Otherwise, the protection from liability conferred by the Second LPR was the same as that conferred by the First LPR.

Because of the unique nature of the services provided by black-start service providers (BSPs), the Second LPR was amended on June 11, 2002, to confer specific protection to BSPs.[33] BSPs were, however, treated somewhat differently than other ASPs in that they were protected from ***all*** claims for damages, whether direct or otherwise, unless the BSP committed a breach of contract.[34]

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28 Cities' Argument, page 2 (paragraph 2.3).

29 AltaLink owns most of the transmission business (certain assets on aboriginal lands were excluded from the sale). ANCA currently owns the distribution business, but has applied for Board approval to sell that business to Fortis Alberta.

30 AR 42/2000.

31 AR 237/2001.

32 Second LPR, section 3(1)(c)(v).

33 *Liability Protection Amendment Regulation*, AR 114/2002. The Second LPR, as amended, was attached to the response to EPCOR-AESO-01(d).

34 Second LPR, sections 3.1(2) and 3.1(3).

The Second LPR expressly provided that it was to be repealed on September 30, 2003.[35]

Over the course of 2002 and 2003, the Government began the process of overhauling and re-enacting the entire EUA, which was ultimately replaced on June 1, 2003 with the statute in its present form. Among the issues considered by the Government was the question of liability protection and to that end, the Government commissioned a report from Miltom Consulting Inc. (Miltom).

In its report to the Government, Miltom concluded that the existing liability regime reflected in the Second LPR should be continued and expanded.[36] In particular, Miltom recommended that the following "regulated entities" be afforded statutory liability protection:[37]

- Power Pool of Alberta
- Power Pool Council
- Power Pool Administrator
- System Controller
- Transmission Administrator
- Balancing Pool Administrator
- Providers of System Support Services
- Transmission Facility Owners
- Distribution System Owners
- Wire Services Providers.

However, Miltom recommended against extending liability protection to the following "unregulated entities".[38]

- Generators, including Independent Power Producers
- PPA Owners
- Retailers, including Regulated Rate Option Providers.

Finally, Miltom recommended that the protection for the MSA and BSPs should also be continued.

With respect to individuals within otherwise protected entities, Miltom recommended as follows:

> For the directors, officers and employees of the regulated entities and of the Market Surveillance Administrator, there should be no personal liability for losses resulting from negligent conduct.
>
> Recovery for losses resulting from acts of bad faith or wilful misconduct should be limited to direct damages only (no indirect or consequential damages).

35 Second LPR, section 5.

36 Miltom Consulting Inc., *Alberta Energy Electricity Liability Review: Final Report*, March 28, 2002 (Miltom Report) [Attachment 1 to BR-EPCOR-2]

37 Miltom Report, page 59. The Board notes that not all of these entities can be considered regulated in any relevant sense (e.g. System Controller and Providers of System Support Services).

38 Miltom Report, page 60. The Board notes that RRO Providers would be considered regulated since their tariffs, including T&Cs, must be approved by the Board.

> The reason why the Consultant recommends protection from liability for individuals for negligence is because the entities with which individuals are associated would remain liable for the conduct of the individuals, thereby satisfying any damages awards (to the extent of insurance coverage) and the individuals would have neither the financial means to pay damage claims personally nor the ability to obtain significant [*sic*] personal liability insurance coverage.[39]

Miltom recommended that the liability protection regime should be enacted in legislation to ensure a level playing field among those already protected by the Second LPR and those "protected" by Board regulation.[40]

With the enactment of the new EUA in 2003, however, the Government did not fully accept the recommendations in the Miltom Report. Instead, the new EUA included Part 5 ("Liability") conferred on "Independent System Operator persons", "market surveillance persons" and "balancing pool persons" essentially the same liability protection previously conferred by the Second LPR. However, section 90 of the EUA was more limited in scope than the previous terms of the Second LPR as they related to the TA and TA persons such as ASPs.

Specifically, section 90 of the EUA defined AESO person in the following terms:

> (c) "Independent System Operator person" means
>
> (i) the Independent System Operator,
>
> (ii) each member of the Independent System Operator,
>
> (iii) each officer and employee of the Independent System Operator,
>
> (iv) each ***agent or contractor*** of the Independent System Operator, and
>
> (v) each affiliate of a person referred to in subclause (iv).

The issues raised in this Liability Module are engaged particularly by the phrase "agent or contractor of the Independent System Operator" in section 90(1)(c)(iv).

4.2 Section 90 of the EUA

4.2.1 Jurisdiction

Very few parties (e.g. the AESO and the Cities) were of the view that the Board can and ought to interpret section 90 of the EUA in the course of attempting to resolve the difficult questions raised in this proceeding. For the most part, ASPs and TFOs discouraged the Board from doing so, largely on the basis that any interpretation of section 90 by the Board would not be sufficiently definitive to provide the comfort claimed by these service providers to be necessary. In the view of these parties, only a court of competent jurisdiction (either the Court of Appeal or the Court of Queen's Bench, depending on the circumstances) could provide that definitive interpretation.

[39] Miltom Report, pages 60-61
[40] Miltom Report, page 61

As a matter of principle, the Board considers that it does have the jurisdiction to interpret section 90 of the EUA in the present context. That context is a module arising from the AESO's 2003 GTA. In the Board's view, the question of whether and how liability protection can and ought to be afforded to certain market participants in the restructured Alberta electric industry has arisen in the context of an application for approval of an AESO tariff. The Board has jurisdiction to consider and approve the AESO's 2003 GTA primarily pursuant to sections 30, 116, 119(4), 121, 122, 124 and 125 of the EUA.

Section 38 of the *Public Utilities Board Act* provides as follows:

> **38** The Board may, as to matters within its jurisdiction, hear and determine ***all questions of law*** or of fact. [Emphasis added.]

Section 38 applies to the Board's consideration of an AESO tariff by virtue of section 145 of the EUA.

Among the questions raised in this Module is whether certain market participants ought to be protected from certain types of liability and, if so, how that protection ought to be provided. To the extent that section 90 of the EUA does not protect some or all of these market participants, the Board has been asked to approve, in principle at least, a tariff-based solution to this difficult problem. In the Board's view, the exercise of its discretion to approve an AESO tariff, including just and reasonable T&Cs that address, wholly or partly, the liability issues raised in this Module requires the Board to first determine the extent to which a tariff-based solution may be necessary. In the Board's further view, that determination requires the Board to reach some conclusion about the scope of section 90 of the EUA. The Board considers that this question of statutory interpretation is a question of law arising in the context of a matter within its jurisdiction, namely the AESO's 2003 GTA.

Accordingly, the Board concludes that it has the jurisdiction to interpret section 90 and must do so in order to exercise reasonably its power to consider and approve these aspects of the AESO's 2003 tariff.

4.2.2 Interpretation

Section 90 of the EUA confers a limited liability protection on "Independent System Operator persons" for "Independent System Operator acts". "Independent System Operator person" is defined in section 90(1)(c) as follows:[41]

> (d) "Independent System Operator person" means
>
> (i) the Independent System Operator,
>
> (ii) each member of the Independent System Operator,
>
> (iii) each officer and employee of the Independent System Operator,

[41] Emphasis added. For convenience and clarity, the Board has referred later in this Decision to "AESO person" and "AESO person act".

(iv) each ***agent or contractor*** of the Independent System Operator, and

(v) each affiliate of a person referred to in subclause (iv).

The AESO is of the view that an ASP and a TFO providing contracted services to the AESO, directly or indirectly, are "agents or contractors" of the AESO within the meaning of section 90(1)(c)(iv) of the EUA. The views of other parties, including ASPs and TFOs, vary, but for the most part consider that their relationship with the AESO is sufficiently uncertain to clearly bring them within the ambit of the statutory definition and, therefore, the statutory protection from liability contemplated by section 90.

This is uncertainty is fuelled, in part, by somewhat inconsistent communications from the Alberta Department of Energy (Alberta Energy or the Department) before, during and after the enactment of the present EUA, and particularly in relation to the recommendation of the Department's own consultant in the Miltom Report that legislated liability protection should be clearly offered to ASPs and TFOs (among others).[42]

In a letter dated November 18, 2002, the Department said the following:

> The consultant also recommended that current liability protection as set out in the regulation be extended to include transmission and distribution facility owners and wire services providers. Having reviewed this recommendation, Alberta Energy advises that it does not support extending liability protection to these market participants as proposed by the consultant.
>
> Market participants such as transmission and distribution facility owners, wire services providers, and ***ancillary service providers should manage their liability using market-based solutions***, whether they operate in the regulated or competitive sector of the marketplace. Provision of ***legislative liability protection*** by government to these market participants ***is not consistent with this principle***.[43] [Emphasis added.]

In a letter dated June 13, 2003, to members of the EUA Advisory Committee, the Department's view appeared to have changed:

> We understand that it is the ISO's view that the effect of s. 90(1)(c)(iv) of the ***New Act is to provide liability protection to ancillary service providers***, including black start providers, providing ancillary services to the ISO as a contractor or as an agent. It is Alberta Energy's view that ***the ISO's interpretation of s. 90 appears to be reasonable.***
>
> With respect to extending statutory liability protection to transmission facility owners or distribution system owners, Alberta Energy's views in that regard have not changed. Those views are set out in our November 18, 2002, letter, a copy of which is enclosed for your ease of reference.[44] [Emphasis added.]

In the Board's view, the difference between the two positions appears to be whether ASPs, including BSPs, ought reasonably to be included within the ambit of the statutory protection afforded directly to the AESO by section 90 of the EUA.

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42 As noted earlier, the Miltom Report was attached to the response to BR-EPCOR-2.
43 BR-TAC-1 (Attachment 1)
44 BR-TAC-1 (Attachment 2)

On August 7, 2003, the Department responded to the concerns of the AESO with what appears to the Board to be yet another, more expansive view, of section 90:

> Section 90 of the EUA provides statutory protection to 'Independent System Operator persons'. Although that term is defined as including the ISO, it also extends to agents and contractors of the ISO. In this respect, ***it was the Department's expectation that the statutory liability protection* afforded *by section 90 would be extended to persons other than the ISO, by the ISO entering into commercial contracts for the exercise of the ISO's powers under the EUA by those persons as agents or contractors of the ISO.*** The ISO will need to obtain such services in order to exercise some of those powers or to carry out some of those duties, functions or responsibilities, and ***the persons contracted for this purpose could be expected to include ancillary service providers, transmission facility operators and others***.[45] [Emphasis added.]

In the right circumstances, it would be open to the Board, in the course of interpreting legislation, to take into account departmental statements about the purpose of the legislation.[46] However, the Board concludes that the views of Alberta Energy reflected in the three letters issued by the Department since late 2002 do not offer clear statements about the intended scope of section 90 of the EUA, especially since each letter appears to take a different view of that scope. To that extent, the Board agrees with parties that the expressions of the Department's views do not materially assist the Board or parties in understanding the intended scope of section 90.

Nevertheless, some reasonable meaning must be given to section 90 of the EUA in light of the history of liability protection outlined earlier. The difficulty faced by the Board is finding a reasonable basis for an interpretation of "agent or contractor" of the AESO sufficiently expansive to include all of those market participants that the Board considers ought to be protected. Without finally determining, at this stage of the Decision, the class of participants that ought to be protected, the Board at least considers that those who provide ancillary services to the AESO, whether directly or indirectly and whether pursuant to a contract or AESO directive (i.e. as contemplated by the current Article 24 of the AESO's T&Cs), are reasonable candidates for protection from liability to the same extent as the AESO under section 90.

However, it is not clear to the Board that the legislature necessarily intended the phrase "agent or contractor" to be even that broad. The Board does agree that any ASP who contracts directly with the AESO to provide ancillary services could be characterized as an "agent or contractor" of the AESO, particularly in light of the definition of "ancillary services" in section 1(1)(b) of the EUA:

> "ancillary services" means those services required to ensure that the interconnected electric system is operated in a manner that provides a satisfactory level of service with acceptable levels of voltage and frequency" … .

When section 90 is read in conjunction with the duties of the AESO set out in sections 16 and 17 of the EUA, the Board considers it seriously arguable that ASPs contracting directly with the AESO could be protected by section 90. However, when the transmission responsibilities of the

45 ENMAX-AESO-7 (Attachment A)
46 Sullivan and Driedger on the Construction of Statutes (4th ed), pages 210-211 and cases cited.

AESO set out in Division 4 of the EUA are taken into account, some doubt is cast on this view. Sections 28 and 29 of the EUA place the following duties and responsibilities on the AESO:

> **28** The Independent System Operator is the sole provider of system access service on the transmission system.
>
> **29** The Independent System Operator must provide system access service on the transmission system in a manner that gives all market participants wishing to exchange electric energy ***and ancillary services*** a reasonable opportunity to do so. [Emphasis added.]

In the Board's view, the express responsibility of the AESO to ensure reasonable system access to ASPs who, as market participants, wish to exchange their services, may be inconsistent with an agent or contractor relationship with those same ASPs. For this reason, the Board is unable to conclude with reasonable certainty that section 90 includes ASPs contracting directly with the AESO. For the same reason, the Board is also unable to conclude that section 90(1)(c)(iv) contemplates with reasonable clarity that ASPs who provide their services indirectly to the AESO through Watt-Ex, for example, or whose services are "conscripted" pursuant to Article 24, are "agents or contractors" of the AESO.

These same doubts suggest that PPA Buyers dispatching ancillary services, contractually or otherwise, are unlikely candidates for inclusion within the scope of section 90, although the Board agrees that they are appropriately considered to be ASPs when doing so. Similarly, the Board considers that section 90 would have to be seriously stretched if it were to be made to apply to a PPA Owner required to dispatch ancillary services from its generating unit pursuant to the exercise by the PPA Buyer of its right to exchange all energy associated with the PPA.[47]

The Board finds it equally difficult to discern an intention by the Legislature to include TFOs as agents or contractors of the AESO. Although there seemed to be general, high-level agreement among parties that, in taking service from the TFO according to the terms of its tariff, including its T&Cs, the AESO entered a "contractual" relationship with the TFO, the Board has not been persuaded either that this relationship is "contractual" or that it is the kind of relationship contemplated by section 90 of the EUA. In that regard, although the Department's letter of August 7, 2003, suggests a contrary view, the two previous letters from Alberta Energy evince a clear intention by the Department, at least, that TFOs were ***not*** intended to be protected by section 90. The Board notes these departmental views only because they are consistent with the Board's reading of section 90.

Taking the usual approach to interpreting legislation, the Board notes that "ancillary services" and "transmission facilities" are defined in section 1 of the EUA, but are not mentioned in section 90. The Board also notes that specific types of service providers (ASPs and BSPs) were expressly protected under the Second LPR, but TFOs were not among them. It would be surprising for the Legislature to have intended to include TFOs in the uncertain phrase "agent or contractor" when they were clearly not expressly protected under the LPR.

[47] The relationship between the PPA Owner and PPA Buyer and their relative rights with respect to energy associated with a PPA were considered thoroughly by the Board in Decision 2002-048, *ESBI Alberta Ltd., 2001 General Tariff Application, Part M: PPA Module* (May 23, 2002), pages 4-19.

In the Board's view, it is more likely that the Legislature intended to confer protection on the AESO and those other entities expressly protected under the EUA because of their non-profit nature, which was new for the transmission system functions of the AESO under the new EUA. Again, this view is consistent with at least some of the views of Alberta Energy as noted earlier.

For all of these reasons, the Board is unable to conclude that section 90 of the EUA, particularly the phrase "agent or contractor of the Independent System Operator," can reasonably be interpreted in the manner suggested by the AESO. In other words, the Board is unable to reasonably conclude that ASPs, TFOs and PPA Owners were intended to be protected from liability by section 90 of the EUA as "agents or contractors" of the AESO.

4.3 Reasonable Scope of Liability Protection in the New World

4.3.1 Who Should Be Protected?

As noted in the Introduction to the Views of the Board, before the passage of the EUA in 1995, customers were served by a small number of vertically integrated utilities. Customers had a direct relationship with the utility serving them and the T&Cs forming part of their contract for utility service generally included a limitation on the liability of the utility for damages that might be suffered by the customer as a result of a service interruption. Typically, the utility was protected from liability for so-called consequential or indirect damages, which included such things as business lost by the customer, as well as direct damages except in certain circumstances. In this Old World, the customer was responsible for ensuring itself against the risk of this type of loss.

The EUA required the functional disintegration of these utilities into generation, transmission and distribution components, with the latter including both the provision of "wires services" and retail supply to the customer. With this separation into functions, the generation and retail supply ends of the chain could be largely de-regulated, leaving the naturally monopolistic transmission and wires services components to be regulated. The Board has previously set out detailed views respecting the move from the "old" to the "new" world under the EUA, particularly in Decisions U97065[48] and U99099,[49] and will not repeat those views here.

The effect of the EUA was to introduce a complex web of relationships amongst the customer and the various market participants now providing only pieces of the integrated service that characterized the Old World. Now, customers may have no direct relationship with a regulated utility. For example, where a customer has exercised the choice to take service from an unregulated retailer, it is the retailer who procures and supplies the electric energy and also arranges for distribution service to the customer. In this new structure, therefore, market participants providing services such as system support (i.e. ancillary services), transmission service and wires services are not necessarily protected from liability for any damages, direct or consequential, that may be suffered by an end-use customer.

Some parties (e.g. IPCAA and the Cities) suggested that the introduction of this greater array of market participants has materially increased the risk of loss to end-use customers and that it would be inappropriate for market participants such as ASPs and TFOs to be protected from liability, at least for consequential damages. However, while the Board acknowledges the increased number of market participants in the New World and the possibility of greater risk as a

[48] Decision U97065, *1996 Electric Tariff Applications* (October 31, 1997), pages 24-28.
[49] Decision U99099, *1999/2000 Electric Tariff Applications* (November 25, 1999), pages 14-43.

result, the Board was not provided with persuasive evidence of an increased risk. Therefore, on balance, the Board is unable to find that the risk has increased.

More importantly, the Board can find no clear intention in the EUA that in exchange for providing services necessary to ensure the safe and reliable operation of the AIES, market participants should be exposed to liability to which they wouldn't have been exposed if the services were being provided by an integrated utility.

In the Board's view, there are at least two potentially material risks that ought to be considered. First, as the Board noted in Decision 2003-059, there is some evidence of a risk that some ASPs will decline to provide services to the AESO in the absence of some form of liability protection. On an interim basis, the Board was satisfied that this evidence justified the unusual step of authorizing the AESO to indemnify ASPs in respect of liability for consequential damages. Although not clearly persuasive, this evidence was not seriously tested in the final proceeding and the Board remains satisfied that there is at least some risk to the AIES if market participants such as ASPs are not protected from liability in some manner.[50]

Second, as the Board also noted in Decision 2003-059, the Board is of the view that it is unreasonable in the long term for customers to be exposed to the risk of compensating the AESO in the event that the AESO is required to indemnify a market participant for consequential loss. In the Board's view, it is not just and reasonable in the long term for customers to be exposed to this risk, which must, therefore, be mitigated as effectively as possible.

The Board was provided with sufficient evidence to satisfy itself that insurance is not a feasible mechanism for service providers, whether regulated or not. Indeed, the evidence tends to establish that insurance may not be available to them in a practical manner.[51] On the basis of this evidence, the Board was not persuaded that insurance is a meaningful alternative. Neither was the Board presented with any real evidence or compelling submission that customers are unable to insure or otherwise protect themselves against service interruptions as they did in the Old World. Indeed, the Board finds merit in the view that it would be more reasonable for customers to bear the burden of insuring their own businesses against their particular risks than it would be for service providers to generally insure against the losses that might be suffered by a wide range of different customers.

The Board observes that there appears to be full support for ASPs to be protected, although in IPCAA's view they are already protected by section 90 of the EUA. There was less agreement among parties in relation to protection for TFOs and other participants such as PPA Owners. The AESO also recommended that the owners of electric distribution systems (DISCOs) be granted protection, which was supported by some parties.[52]

The Board concludes that liability protection in the New World should, as closely as possible, reflect liability protection in the Old World, without granting more protection than would be reasonably necessary in light of New World circumstances. On that basis, having considered the

[50] The Board also notes, with some sympathy for their arguments in this respect, that TFOs are obliged to offer their services to the AESO pursuant to section 39(3)(e) of the EUA.

[51] See, for example, the "Liability Risk Assessment Report" prepared by Marsh Canada for AltaLink (Attachment to AESO-AL-02).

[52] See, for example, the ENMAX Reply, page 3 (paragraph 10). The Board uses the term "DISCO" to include both the distribution facility owner and an authorized wire services provider.

persuasive arguments of the service providers, the Board considers that ASPs, TFOs and PPA Owners should, to some degree, be protected from liability. Although there was little discussion of the merits of extending protection to DISCOs, the Board sees no reasonable basis for excluding them from protection since it would have been available to them in the Old World.

In the Board's view, ASPs should be protected whether they provide services directly to the AESO, through contract, or pursuant to Article 24 of the AESO's T&Cs, or indirectly through Watt-Ex. With respect to PPA Owners, the Board finds merit in EPCOR's view that protection should be available "to the extent that a PPA Owner operates its unit at the direction of the PPA Buyer to provide ancillary services or fails to generate electricity that is required for such ancillary services."[53]

The Board notes the express support contemplated for inclusion of BSPs in the views of Alberta Energy in the Policy Notice – Liability accompanying the Comment Matrix circulated to the EUA Advisory Committee on August 29, 2002:

> **Policy Notice – Liability**
>
> Alberta Energy would like to provide stakeholders with this follow-up to the final report by Miltom Consulting on the Liability Review.
>
> Alberta Energy is reviewing the appropriateness of statutory treatment of black-start liability protection. Such clarity may be better suited to a regulation. The option is to have a liability regulation specifically for black-start matters. The rationale is that the future ISO may negotiate different conditions with providers of black-start service that does not require current treatment. However, in the event that some liability protection continues to be appropriate, such treatment could be provided in a regulation.[54]

Although not defined in the EUA, BSPs are clearly a type of ASP and, to that extent, the Board agrees that they should be protected from liability along with other ASPs. However, the Board acknowledges that the special circumstances of BSPs may warrant slightly different treatment, as was recognized in the Second LPR.[55]

4.3.2 Should Directors, Officers and Employees Be Protected?

Most parties arguing in favour of liability protection, including the AESO supported the inclusion of directors, officers and employees of protected parties. The Board said the following in relation to this question in Decision 2003-059:

> Although the Board is sympathetic to the ASPs desire to have individual liability protection extended to them, the Board is not persuaded that this protection should be extended on an interim basis. The Board notes that section 90(1)(c)(iii) of the EUA provides protection only to the "officers and employees" of the AESO, as such, and does not purport to extend similar protection to any individuals within an "agent or contractor" of the AESO. Only affiliates of agents or contractors are granted protection by section 90(1)(c)(v) of the EUA. At this interim stage, the Board is concerned not to overextend the liability protection afforded to ASPs beyond the level of protection contemplated by section 90.

53 EPCOR Argument, pages 3-4
54 See BR-EPCOR-02
55 These issues were addressed by CMH in its Argument and Reply. See also the response to TAU-AESO-01.

> Given that these interim measures are required because of the perceived lack of clarity in section 90, the Board does not consider it reasonable and in the public interest to extend to officers and employees of ASPs (who may or may not, in law, be "agents or contractors" of the AESO) the same protection as officers and employees of the AESO, which is clearly granted by section 90(1)(c)(iii) of the EUA. Accordingly, the Board will not direct the AESO to amend Article 14 to include individual members of ASPs. However, whether individual protection can or ought to be extended to ASPs is an issue that the Board will consider on a final basis in the upcoming process.[56]

The Board notes that the Second LPR provided protection to "***directors***, officers and employees" of otherwise protected entities. Sections 90-92 of the EUA, however, only extend protection to "officers and employees" of the entities protected by those sections. The reason for the omission of "directors" is not clear to the Board and no party expressly addressed it.

Rather, the AESO and a number of other parties supported the protection of "directors, officers and employees" unless that person's act causing direct loss or damage was not carried out in good faith. The Board notes that an individual could, for example, be negligent but not individually liable for direct damages if his/her act was carried out in good faith. In such a case, the Board considers that the "protected" entity of which the individual was a member could, however, still be liable if, in law, the act of the individual was the act of the entity and the act amounted to negligence.

The Board notes the broad support for inclusion of directors, officers and employees of otherwise protected entities in addition to the AESO. The Board also notes the basis for the recommendation of Miltom that individuals be protected from liability:

> The reason why the Consultant recommends protection from liability for individuals for negligence is because the entities with which individuals are associated would remain liable for the conduct of the individuals, thereby satisfying any damages awards (to the extent of insurance coverage) and the individuals would have neither the financial means to pay damage claims personally nor the ability to obtain significant personal liability insurance coverage.[57]

In light of the continued exposure of the otherwise protected entity even if the individual is not liable, the Board considers protecting these individuals from liability to be reasonable, except where they act in bad faith. However, since the Board remains unclear of the Legislature's reason for excluding "directors" from individual protection in section 90 of the EUA, the Board would be uncomfortable in concluding in this Decision that they should be protected in relation to ASPs, etc., when they are not statutorily protected in relation to the AESO and AESO persons. Based on the submissions made in this Module since Decision 2003-059 was issued, and subject to the foregoing reasons, the Board concludes that it would be appropriate to extend liability protection to officers and employees of ASPs, TFOs, DISCOs and PPA Owners. However, as under section 90 of the EUA for AESO persons, protection for these individuals should not be available if their actions are not carried out in good faith.

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56 Decision 2003-059, pages 5-6.
57 Miltom Report, page 60.

4.3.3 In Relation to What Damages Should Liability Protection Be Available?

Section 90 of the EUA protects the AESO and "AESO persons" from liability, except in certain circumstances and then only for "direct loss or damage". Where someone who is not an individual commits the act causing the damage, protection is ***not*** available if the act constitutes wilful misconduct, negligence or breach of contract.[58] If an individual commits the act causing the damage, protection is ***not*** available if the act is ***not*** carried out in good faith.[59] In any of these circumstances, liability extends only to direct loss or damages.[60]

"Direct loss or damage" is defined in section 90(1)(a) of the EUA as follows:

> (a) "direct loss or damage" does not include loss of profits, loss of revenue, loss of production, loss of earnings, loss of contract or any other indirect, special or consequential damages whatsoever arising out of or in any way connected with an Independent System Operator act. ... .

In effect, section 90 protects the AESO and AESO persons from all liability for consequential damages, however that damage may be caused, and limits liability for direct damages due to certain types of acts (wilful misconduct, negligence, breach of contract, bad faith).

The provisions of the EUA conferring liability protection on the Market Surveillance Administrator and the Balancing Pool are expressed in essentially similar terms.[61]

In the Board's view, these provisions substantially reflect the protection available to service providers in the Old World, although in some cases there is greater exposure for certain types of direct damage claims. In the Board's further view, these provisions reflect an appropriate balance between protection and exposure. In particular, the Board considers the exclusion of liability for consequential damages altogether to be reasonable in light of the potential consequences to end-use customers if they were ultimately required to bear financial responsibility for these losses through their rates (e.g. if the AESO were required to indemnify another market participant and sought to recover the indemnified amount from its customers).

The Board has been provided with no persuasive evidence or compelling submission that would lead the Board to conclude that industry restructuring alone is sufficient reason to expose market participants to liability for consequential damages. In that regard, the Board considers that the views it expressed in Decision 2001-28 continue to be instructive:[62]

> In the absence of contrary evidence, the Board considers that the TFO continues to operate in a manner consistent with standard industry practices and be regulated according to a generally similar risk and reward structure, notwithstanding deregulation. The Board does not agree with IPCCAA, at this time, that the changes to the electric industry render the previously approved protections from liability overly broad and inappropriate.

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58 EUA, section 90(3)(a)
59 EUA, section 90(3)(b)
60 EUA, section 90(4)
61 EUA, sections 91 and 92, respectively.
62 Decision 2001-28, TransAlta Utilities Corporation, 2001 Transmission Facility Owner Tariff Application, Terms and Conditions of Service and Code of Conduct (April 24, 2001), page 10. The same views were expressed in Decision 2001-029, EPCOR Transmission Inc., 2001-2002 Transmission Facility Owner Tariff, Terms and Conditions of Service (April 24, 2001), page 11.

> Several parties, particularly IPCCAA, submitted that liability should be apportioned according to who is better able to bear the risk. However, beyond this assertion, the Board was not presented with compelling evidence that would assist in answering this question. The Board notes that it was not presented with sufficient evidence as to the cost or availability of supplemental insurance for consequential damages, and whether the insurance cost by the TFO would duplicate costs already incurred by customers. Indeed, the Board was presented with some evidence that IPCCAA members had found the cost of insuring against consequential damages to be prohibitive. The Board also heard evidence and submissions from the TFOs that customers are better able to insure against the risks of consequential damages. The TFOs' view was that it was virtually impossible for a utility to assess and insure against the loss from consequential damages to individual customers. The Board also notes that the potential cost of a major consequential damage claim could be disastrous even for the largest participants in the restructured electrical industry.

The Board notes the views of several parties that electricity service has never been guaranteed. The Board accepts that the infrastructure necessary to provide these services was developed, in the Old World, with the expectation that utilities would not be exposed to potentially significant consequential damage claims.[63] As ENMAX submitted:

> This infrastructure was not constructed to provide absolute reliability. It was constructed to provide a high level of reliability at a reasonable cost.[64]

Notwithstanding its views of the uncertain scope of section 90 of the EUA, the Board considers that the EUA reflects a policy of the Government that liability for consequential damages is not reasonable, at least in relation to those market participants to whom sections 90, 91 and 92 apply. In light of the Board's views with respect to who should be protected and why, the Board sees no reasonable basis for exposing some market participants to consequential damage claims and not others when all may be required to provide service to ensure the reliability of the AIES.

Accordingly, the Board concludes that it would be appropriate and reasonable for ASPs, TFOs, DISCOs and PPA Owners to be protected from liability for consequential damages. For the same reason, the Board concludes that these participants should benefit from the same protection from direct damage claims as provided to AESO persons by section 90 of the EUA. In other words, these entities would ***not*** be protected from liability for direct damages if they are guilty of negligence, wilful misconduct or breach of contract (or, if an individual, the individual acts in bad faith).

4.3.4 Cap on Liability for Direct Damages?

Some parties recommended that, even in relation to participants' partly limited liability for direct damages, the Board should impose a cap on the amount that could be recovered by a customer.[65] For example, ATCO Power based its recommendation on the potential costs associated with the widespread and prolonged power outage in Ontario and parts of the United States in August

63 See, for example, TransAlta's Argument, page 2.
64 ENMAX Argument, page 1, para. 3.
65 ATCO Power, ASTC Partnership, TransAlta

2003, as well as on the sometimes-difficult task of distinguishing between direct and indirect damages.[66]

The Board notes that section 90 of the EUA does not set a cap on the liability of an AESO person in relation to those direct damage claims to which the AESO person continues to be exposed. The Board also notes, as discussed by ATCO Power, that caps were considered in the Miltom Report as one approach to liability protection. However, the Board notes the following conclusion in the Miltom Report appearing immediately after the paragraph quoted in paragraph 27 of ATCO Power's Argument:

> Although the numbers we have used are hypothetical, they illustrate the principle. Alberta, like the vast majority of jurisdictions we have examined, has implicitly decided that the objective of behaviour modification is adequately achieved with the existing risk of an award by the court to cover direct damages, which can be very large. The Consultant sees no reason to recommend a change in this situation for the purpose of enhancing behaviour modification.[67]

In the Board's view, section 90 of the EUA reflects a reasonable balance between protection and liability without a cap on those direct damage claims to which an otherwise protected person remains exposed. Accordingly, the Board concludes, on the basis of the current record, that a cap on liability for direct damages is not warranted in relation to ASPs, TFOs, DISCOs or PPA Owners.

4.4 Legislative vs. Tariff-Based Solution

The Board notes that most parties considered any tariff-based approach to addressing these difficult liability issues to be second best and that a legislated solution was the preferred alternative. Accordingly, most parties, including the AESO, were of the view that the Board ought to make a recommendation to the Government either to amend the EUA or to enact regulations under section 94 of the EUA.

Among the reasons for supporting a legislative rather than a tariff approach, the Board considers the following:

- The compelling fact that a tariff-based approach would be complex.
- The array of market participants (some regulated by the Board, some not) would necessarily leave gaps that could produce inequitable results.[68]
- The uncertainties of a tariff-based approach, particularly arising from the privity of contract issues, make this approach less than optimal.[69]

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66 ATCO Power Argument, pages 5-7, paragraphs 19-28

67 Miltom Report, page 51 (BR-EPCOR-02, Attachment 1)

68 The Board considers that the submissions of ENMAX in its Argument illustrate the difficulties faced by the Board in attempting to craft a workable solution in the tariff context. See, for example, ENMAX Argument pages 6-9 (paragraphs 22-31) and pages 11-12 (paragraphs 39-46).

69 Although some parties spent considerable effort in their arguments addressing the privity issues, the Board does not find it necessary to analyze those issues in detail. The Board accepts that privity of contract raises serious questions about the effectiveness of a tariff-based approach and contributes to an unreasonable level of uncertainty.

- Indemnities of some form would still be required to fill in "gaps" that would be left in even a well-crafted tariff solution and the Board has already expressed the view in Decision 2003-059 that indemnities are not in the long-term interest of Alberta electricity customers.
- Market-based solutions appear to be impractical or unavailable.[70]
- As discussed below, the EUA appears to leave policy questions relating to liability protection to Cabinet.

In this last regard, the Board is concerned about the possible effect of section 121(2)(c) of the EUA, which had no counterpart in the Old EUA before June 1, 2003. This section provides that, when considering a tariff application, the Board must, among other things, ensure that

> (c) if the regulations so require, the tariff incorporates the standard of liability imposed by the regulations made by the Lieutenant Governor in Council under section 94, or that the Board has, in accordance with those regulations, considered and imposed a standard of legal liability that it considers appropriate.

In light of the broad power of Cabinet under section 94 to make regulations respecting standards of liability and liability protection, and in light of this new requirement to take those standards into account in a tariff application, the Board questions whether it is appropriate, in the absence of regulations, to attempt to craft a tariff-based solution even for tariff-regulated entities such as TFOs and DISCOs. In the Board's view, the EUA appears to leave policy questions relating to liability protection to Cabinet. As a result, the Board finds it difficult to fully understand the Department's suggestions that TFO and DISCO liability ought to be addressed only by the Board in the tariff context.

In the Board's view, parties have raised a number of serious difficulties with any tariff-based mechanism to address liability in the New World. The Board agrees that a tariff-based solution would necessarily be complex and subject still to significant uncertainty. On that basis, the Board concludes that the best solution to these complex issues is a legislated one. In particular, the Board concludes that it is appropriate and necessary for the Government of Alberta to resolve these issues either through amendments to the EUA or through regulations enacted pursuant to section 94.

Accordingly, the Board makes the following recommendation to the Government of Alberta:
The Board recommends that the Government of Alberta either amend the *Electric Utilities Act* or enact regulations pursuant to Section 94 of the Act to provide liability protection to Ancillary Service Providers (including Black-Start Service Providers), Transmission Facility Owners, Owners of Electric Distribution Systems and PPA Owners, including their officers and employees, in accordance with the views expressed by the Board in this Decision.

The Board directs the AESO forthwith to initiate discussions with appropriate members of the Government of Alberta in furtherance of the Board's recommendation. The Board also directs the AESO to advise the Board and all parties to this proceeding that discussions have commenced.

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[70] The Board shares the uncertainty expressed by ENMAX in relation to Alberta Energy's views, variously expressed in each of its letters, that "market based solutions" are appropriate for liability protection, particularly in relation to TFOs and DISCOs.

Furthermore, the Board directs the AESO to advise the Board of the progress of these discussions no later than April 1, 2004 and to provide the AESO's views on the likelihood of the Board's recommendation being implemented, in whole or in part.

The Board also encourages the AESO, in the context of these discussions, to explore with the Government the reasons for the exclusion of directors from individual protection under the EUA with a view to determining whether they should be protected either under section 90 or in relation to those entities for whom the Board has recommended protection in this Decision, or both.

Although some parties urged the Board to implement a tariff-based solution, with indemnification where appropriate, pending the implementation of a legislative solution by the Government, the Board does not consider that approach to be practical or necessary at this time. The Board was presented with a range of recommended tariff/indemnification solutions from various parties and considers that it would be difficult to pick and choose from among them while still achieving a result that would be reasonable and acceptable to parties, even on an interim basis. In the Board's view, it would be more appropriate simply to continue the interim amendment to Article 14 approved in Decision 2003-059. However, in light of the Board's views respecting the long-term undesirability of indemnification by the AESO, the Board considers that this interim measure should end by a date certain.

In that regard, if matters cannot be concluded with the Government of Alberta as recommended in this Decision by July 1, 2004, then the Board directs the AESO to advise the Board to that effect no later than July 1, 2004. At the same time, if those matters cannot be concluded, the Board directs the AESO to recommend a process that will lead to Board approval of a tariff based solution, no later than December 1, 2004, by proposing the necessary amendments to the T&Cs of the AESO, TFOs and DISCOs in order for them to be effective January 1, 2005.

Accordingly, the Board confirms its approval on an interim basis of the amended Article 14 of the AESO's T&Cs attached as Appendix B to Decision 2003-059 and reproduced in Appendix B to this Decision. However, this approval will terminate effective December 31, 2004, and is subject to the following direction.

The Board directs the AESO to further amend Article 14 by providing that the amendments to Article 14 approved on an interim basis in Decision 2003-059 and confirmed in this Decision will terminate effective December 31, 2004.

The Board emphasizes that the conclusions and recommendations in this Decision are without prejudice to the rights and/or obligations of the AESO to apply to the Board for any further relief that the AESO deems necessary to fulfill its duties and responsibilities under the EUA.

5 SUMMARY OF CONCLUSIONS

This section is provided for the convenience of readers. In the event of any difference between the Conclusions in this section and those in the main body of the Decision, the wording in the main body of the Decision shall prevail.

9. Accordingly, the Board confirms its approval on an interim basis of the amended Article 14 of the AESO's T&Cs attached as Appendix B to Decision 2003-059 and reproduced in Appendix B to this Decision. However, this approval will terminate effective December 31, 2004, and is subject to the following direction. 45

10. The Board emphasizes that the conclusions and recommendations in this Decision are without prejudice to the rights and/or obligations of the AESO to apply to the Board for any further relief that the AESO deems necessary to fulfill its duties and responsibilities under the EUA. 45

6 SUMMARY OF DIRECTIONS

This section is provided for the convenience of readers. In the event of any difference between the Directions in this section and those in the main body of the Decision, the wording in the main body of the Decision shall prevail.

1. The Board directs the AESO forthwith to initiate discussions with appropriate members of the Government of Alberta in furtherance of the Board's recommendation. The Board also directs the AESO to advise the Board and all parties to this proceeding that discussions have commenced. 44
2. Furthermore, the Board directs the AESO to advise the Board of the progress of these discussions no later than April 1, 2004 and to provide the AESO's views on the likelihood of the Board's recommendation being implemented, in whole or in part. 45
3. The Board also encourages the AESO, in the context of these discussions, to explore with the Government the reasons for the exclusion of directors from individual protection under the EUA with a view to determining whether they should be protected either under section 90 or in relation to those entities for whom the Board has recommended protection in this Decision, or both. 45
4. In that regard, if matters cannot be concluded with the Government of Alberta as recommended in this Decision by July 1, 2004, then the Board directs the AESO to advise the Board to that effect no later than July 1, 2004. At the same time, if those matters cannot be concluded, the Board directs the AESO to recommend a process that will lead to Board approval of a tariff based solution, no later than December 1, 2004, by proposing the necessary amendments to the T&Cs of the AESO, TFOs and DISCOs in order for them to be effective January 1, 2005. 45
5. The Board directs the AESO to further amend Article 14 by providing that the amendments to Article 14 approved on an interim basis in Decision 2003-059 and confirmed in this Decision will terminate effective December 31, 2004. 45

7 ORDER

For and subject to the reasons set out in this Decision, IT IS HEREBY ORDERED THAT:

(1) The interim approval to amended Article 14 of the AESO's Terms and Conditions in Decision 2003-059 is confirmed.

(2) This interim approval shall expire on December 31, 2004.

Dated in Calgary, Alberta on December 18, 2003.

ALBERTA ENERGY AND UTILITIES BOARD

A. J. Berg, P.Eng.
Presiding Member

R. G. Lock, P.Eng.
Member

J. R. Nichol, P.Eng.
Member

APPENDIX A – EUB BOARD LETTERS OF JULY 17 AND AUGUST 28, 2003

"Appendix A -
03-07-17 EUB Board

(Consists of 10 pages)

"2003-08-28 EUB
Letter - AESO 2003 (

(Consists of 3 pages)

EUB Alberta Energy and Utilities Board
Calgary Office 640 – 5 Avenue SW Calgary, Alberta Canada T2P 3G4 Tel 403 297-8311 Fax 403 297-7336

File No. 1808-1-1
Application No. 1306252

July 17, 2003

SENT BY EMAIL

All Interested Parties
Alberta Electric System Operator
Liability Module - 2003 General Tariff Application

Dear Sir/Madam:

Re: Alberta Electric System Operator – 2003 General Tariff Application (GTA) Liability Module - Application No. 1306252

Notice of Proceeding

On June 25, 2003, the Board issued correspondence to the Alberta Electric System Operator (AESO) in which the Board directed the AESO to propose a process by which the Board may hear the liability issue which arose in the context of the AESO's 2003 GTA.[1]

In response to that direction, the Board received a submission from the AESO dated July 3, 2003, in which the AESO requested approval, on an interim basis, of an amendment to its existing tariff effectively authorizing the AESO to indemnify the providers of ancillary services (ASPs). The Board will deal with this interim tariff amendment by way of a separate Board Order to be issued shortly.

In its July 3 correspondence, the AESO also proposed a process by which the Board may hear and decide, on a final basis, the issue of liability protection. Subsequent to the AESO's submission, on or about July 9, 2003, the Board received submissions from a number of interested parties commenting upon the AESO's proposals.[2] At the request of the Board, the AESO provided a brief reply to parties' submissions in a letter dated July 16, 2003.

Generally speaking, the parties supported both the proposed tariff amendment as well as the procedural option proposed by the AESO. The Board shares the concerns of parties that this issue must be addressed as quickly as possible in light of the withdrawal of services by some

1 Application No. 1290683
2 The Board also received a late submission from Duke Energy Marketing Limited Partnership, dated July 14, 2003.

ASPs following the removal of legislative liability protection when the *Electric Utilities Act 2003* came into force on June 1, 2003. In light of the broad support for the process proposed by the AESO, therefore, the Board has established the following schedule for a written process:

Notice of Intention to Participated in Proceeding	July 30, 2003
Submission of Evidence (all parties)	July 30, 2003
Information Requests on Evidence	August 8, 2003
Responses to Information Requests	August 15, 2003
Rebuttal Evidence	August 19, 2003
Parties Advise re Oral Hearing/Argument	August 21, 2003
Board advises re Oral Hearing/Argument	August 22, 2003
Written Argument	August 28, 2003
Written Reply	September 5, 2003
Oral Proceeding (if necessary)	Early September

Subsequent to the receipt of evidence and the responses to information requests, the Board will confirm that a written process continues to be in order or whether an oral proceeding might be more effective. Out of an abundance of caution, the Board has tentatively set aside early September as the time frame for an oral hearing (evidentiary and argument or argument only, as the case may be), should one prove necessary. As indicated in the schedule above, the Board will advise parties on or before August 22, 2003, whether it considers an oral hearing of some kind to be necessary.

Although the Board will express more detailed views in the forthcoming Board Order dealing with the AESO's proposed interim tariff amendment, the Board does share FIRM's concern with the exposure of end-use customers to the costs potentially faced by the AESO if the AESO is required to indemnify an ASP, including as proposed by the AESO in its interim amendment of Article 14 of its Terms & Conditions of Service (T&C). In the Board's view, whether indemnities of this kind, and their attendant risk to customers, are in the overall, long-term public interest are critical issues that must be addressed directly in this proceeding. Therefore, the Board requests that parties address comprehensively in their evidence all reasonable options that may be available to the Board to protect customers from these potential risks.

The Board is particularly interested in how the AESO's T&C, and/or those of other market participants, could be amended to provide ASPs and/or transmission facility owners (TFOs) with the level of liability protection found by the Board to be reasonable and in the public interest, without requiring the AESO to indemnify any party.

While the Board acknowledges the AESO's view with respect to section 90 of the EUA, the Board also notes the concerns expressed by some parties about the Board's power to interpret these provisions of the EUA in this context. Presently, there is some question whether the Board can or ought to deal with this liability issue as a matter of statutory interpretation.

Accordingly, the Board directs the AESO to develop for the Board's consideration a comprehensive alternate option (or options) that may address the Board's concern. In the Board's view, the option(s) should be developed with regard to the following key issues:

- the extent to which customers should be precluded from seeking damages from other market participants – e.g. consequential damages only, or both direct and consequential damages

- the T&C provisions that might be required to achieve the desired level of liability protection

- the tariffs that might require amendment as a result of any Board-approved amendments to the T&C to achieve this level of protection – e.g. TFO tariffs and/or distribution tariffs

- whether and how the AESO's tariff, in particular, could be the vehicle for achieving this level of protection - e.g. AESO T&Cs requiring the owner of an electric distribution system (DISCO), as a condition of system access service, to extract an agreement from the DISCO's customers, or otherwise through its own T&C, that the customer cannot seek damages against an ASP or TFO.

The Board recognizes that implementation of such an option may require the DISCOs in particular to amend their T&C. Accordingly, in order to facilitate the expeditious consideration of any resulting applications by other electric utilities for amendments to their tariffs to give effect to the option found by the Board to be in the public interest in this proceeding, the Board strongly encourages those utilities to address their related issues in the context of this proceeding. The more comprehensively these options can be addressed at the evidence stage, the more expeditiously will the Board be able to consider and determine these important issues.

For the convenience of interested parties, the Board has attached a copy of both the Board's correspondence to the AESO of June 25, 2003 as well as the AESO's response of July 3, 2003.

Also, please be advised that the Board has assigned this module Application No. 1306252, File No. 1808-1-1.

Thank you for your attention to this matter. Should you have any questions please contact Jamie Cameron at Jamie.Cameron@gov.ab.ca or by phone at (403) 297-6078.

Yours truly,

Jamie Cameron
Application Officer

cc: Interested Parties DISCO and TFO Applications

EUB Alberta Energy and Utilities Board
Calgary Office 640 – 5 Avenue SW Calgary, Alberta Canada T2P 3G4 Tel 403 297-8311 Fax 403 297-7336

File No. 1808-01
Application No. 1290683

June 25, 2003

SENT BY EMAIL

All Interested Parties
Transmission Administrator of Alberta
2003 General Tariff Application

Dear Sir/Madam:

Re: Transmission Administrator of Alberta – 2003 General Tariff Application Application No. 1290683

The Board received intervener evidence on June 9, 2003, addressing the issue of liability protection, from both TransCanada Energy (TCE) and AltaLink Management Ltd.- TCE from the perspective of an ancillary service provider and AltaLink from the perspective of a transmission facility owner. On June 16, 2003 the Board received correspondence from IPCCAA in which IPCCAA expressed the view that this issue has been addressed elsewhere and requested an order from the Board that this item be taken off the issues list for this proceeding. IPCCAA also requested that if the Board does not grant this order, that IPCCAA be granted an extension of time to file evidence on this matter.

The Board notes that the TA (AESO) is the common counterparty with whom TFOs, DISCOs and direct connect customers all contract. Accordingly, the Board does not consider that this issue can be dealt with in an appropriate or comprehensive manner without the input of the AESO. While the liability protection issue has been raised in other proceedings, the Board does not consider that this issue has been resolved. In addition, the Alberta Energy letters to which IPCCAA refers, only considers the issue of statutory liability protection, and leaves open the possibility of other approaches being taken to address this issue. Therefore, the Board considers it appropriate to deal with this issue within the context of the AESO General Tariff Application proceeding. Accordingly the Board denies IPCCAA's request to have this issue removed from these proceedings.

The Board is willing, however, to establish a separate process to hear this issue on a timely basis and is prepared to entertain comments from the parties on the format within which this process should take place. However, the Board does not wish to have inclusion of the liability issue delay, for example, the approval of the AESO's administrative expenses for 2003 or any other

aspects that parties can agree to in the current negotiation process. Further, the Board wishes to complete this process respecting liability including issuing a Board decision, prior to the commencement of the generic cost of capital proceeding.

With respect to the liability issue, the Board directs the AESO to propose a process, by Friday, July 4, 2003, including comments on whether a further amendment to the application would be required to address this issue. All parties wishing to express views on the AESO's proposed process should provide their submissions to the undersigned by Wednesday, July 9, 2003. Further, the Board requests the AESO, when it makes its submissions on July 4, to remind parties of their opportunity to provide comments to the Board by the July 9 deadline.

With regard to IPCCAA's request that it be granted an extension of time to file evidence if the Board ruled that the liability protection issue remain on the issues list in this proceeding, the Board considers that it is not necessary to address this request until the Board determines the process for dealing with this issue within the AESO GTA proceeding.

Thank you for your attention to this matter. Should you have any questions please contact Jamie Cameron at Jamie.Cameron@gov.ab.ca or by phone at (403) 297-6078.

Yours truly,

(sent by email)

Jamie Cameron
Application Officer

July 3, 2003

Mr. Jamie Cameron
Application Officer
Alberta Energy and Utilities Board
640 – 5th Avenue SW
Calgary, AB
T2P 3G4

Dear Mr. Cameron:

Re: Transmission Administrator of Alberta (AESO) – 2003 General Tariff Application – No. 1290683 (File No. 1808-1)

We are in receipt of the Board's letter of June 25, in which the AESO is directed to propose a process, by today July 4, 2003, pursuant to which the Board may hear the liability protection issue which has arisen in our 2003 GTA application.

The AESO's response to the Board's request is in two parts. The first is a request by the AESO for the Board to approve, on an interim basis, certain amendments to its Tariff as set out below. The second part addresses the nature of the process which AESO believes the Board might adopt to deal with the liability protection issues.

I. Interim Tariff Amendment

As is apparent from the evidence to date in this proceeding,[3] the issue of liability protection is a matter of some significant importance to many parties, including the AESO, particularly in view of the revocation of the Liability Protection Regulation (LPR) upon the coming into force of the Electric Utilities Act (EUA) on June 1.

Increasingly since that time, if not before, the AESO has been advised of the serious concerns of market participants, who have previously been accorded protection from liability as a matter of law, as to their increased risk exposure in the provision of services to, or in relation to their commercial contractual relations with, the AESO. These concerns are also shared by other market participants, who, while not previously accorded liability protection as a matter of law, nevertheless are of the view that in the context of the evolving and restructured market in Alberta, they are increasingly exposed to unacceptable levels of liability risk.

More recently, the AESO has been advised by certain ancillary service providers, in view of what they perceive as unacceptable risk exposure, that they have withdrawn or intend to withdraw from the provision of ancillary services, which are of course essential to the due performance by AESO of its statutory duties. These concerns have most recently been expressed in correspondence to the AESO from TransCanada Energy, EPCOR, ATCO Power Ltd. and TransAlta Utilities Corporation. Copies of this correspondence are attached.

3 See, for example, the AESO's response to Information Request TCE-05; TCE Evidence; AltaLink Evidence

The Board will appreciate the significance of these developments, given the important role which these service providers play in ensuring the safe, reliable and economic operation of the interconnected electrical system.

The AESO is obliged to take all prudent steps as may be necessary to ensure that any actions such as those contemplated in the attached correspondence do not, in turn, imperil the reliable operation of the interconnected electric system in Alberta.

At the present time, and as an interim measure, the AESO believes it is necessary and prudent to amend Article 14 of its Tariff to include both the express right of the AESO to indemnify persons who provide ancillary services to the AESO and also to expressly grant indemnification protection for Customers who provide ancillary services pursuant to Article 24. The proposed tariff amendment is attached for review and approval by the Board.

In parallel with the proposed amendments, the AESO will be taking immediate steps to make appropriate contractual amendments with those ancillary service providers whose arrangements are not otherwise governed by the Tariff, to provide indemnification in a manner similar to that proposed in the interim tariff amendment.

The AESO believes these steps are necessary interim measures to ensure system reliability is not in any way placed at risk while the issues before the Board are determined. The long-term suitability of and need for the proposed tariff and contractual amendments would, in effect, become matters to be decided by the Board in the contemplated process discussed in Part II of this letter.

The AESO invites interested parties to provide their comments on the proposed interim tariff amendments as soon as may be possible, and in any event, not later than July 9, in order that the Board may deal with this request expeditiously.

II. Liability Protection - Procedure

The AESO welcomes the Board's decision to embark upon a discrete process within the context of the 2003 GTA in order to deal with the liability protection issue. The AESO is particularly conscious of the Board's wish to ensure that its decision on this issue is released prior to the commencement of the Generic Cost of Capital proceeding announced for November 12, 2003.

Nature of the Liability Protection Issue – the AESO's View

The AESO is concerned with the effective and reliable operation of the system that it is charged with overseeing, and it is that duty which informs our position on this matter, both procedurally and as a matter of substance.

Clearly, the liability protection issue extends over many sectors of the marketplace. Ancillary service and black start providers (ASPs), which were specifically protected by the LPR, are affected. Transmission facility operators (TFOs) have growing concerns on the point, due to the

changing structure of the industry. [Others, such as DISCO's and direct connect customers, may share the concern about liability risk???

The issue clearly begins with the EUA, which specifically provides liability protection to those who are agents or contractors of the AESO for the purposes set out. The Board notes in its letter of June 25 that the AESO is a common counter party to contractual arrangements with many market participants. In the AESO's view, it is fairly arguable, if not reasonable, that to the extent prescribed by the EUA, liability protection is accordingly provided to those participants

.

Equally, the AESO recognizes that a number of parties, including those with whom the AESO contracts, do not subscribe to this interpretation of the EUA, and believe that there are better alternative methods of providing an appropriate degree of liability protection. Insurance, which by all accounts is prohibitively expensive, does not appear to be one of these; explicit liability protection (similar to the LPR) for affected market participants seems to be the preferred alternative, but appears to be contrary to the Government's policy; appropriate indemnification by the AESO is considered to be a viable option.

The question is reasonably straightforward: can the AESO discharge its statutory duties in the Alberta public interest in the absence of a reasonable, and demonstrable, degree of either protection against or indemnification of liability being provided to affected market participants? Increasingly, as noted earlier, the AESO is concerned that the answer to this important question may be 'no.'

In this general context, then, the AESO believes that an appropriate process within which the liability protection issue may be resolved should be responsive to the following questions:

(a) Within the meaning of Part V of the EUA, are ASPs (including those who offer services through Watt-Ex) and TFOs contractors of the AESO, and therefore entitled to the protection against liability provided therein to "Independent System Operator persons' in respect of 'Independent System Operator acts'? Are there other market participants who are contractors of the AESO for this purpose?[4]

(b) In the alternative, or in any event, if ASPs and TFOs are not, in the Board's view, contractors of the AESO within the meaning of the EUA EUA:

(i) Should the AESO, in support of the effective discharge of its statutory duties under the EUA, indemnify ASPs and TFOs [and others??] in respect of liability they may incur, in that regard?

(ii) If so, in respect of what liability should ASPs and TFOs [and others??] be indemnified?

(iii) If so, should such indemnification extend to consequential loss, direct loss, or all loss?

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4 The Board has authority to determine such questions of interpretation or law: see EUA s.145; *Alberta Energy and Utilities Board Act*, s. 13, 15; *Public Utilities Board Act*, s. 38.

(iv) If so, what is the appropriate mechanism through which to provide such indemnification? The AESO's tariff? TFO's tariffs? Bilateral contracts between the AESO and market participants? All of the foregoing?

(v) If so, what should be the relevant terms and conditions for such indemnification?

(vi) If so, to what extent is it appropriate for the Board to specifically provide in its decision, as a matter of principle, that indemnification costs incurred by the AESO will be recoverable pursuant to the EUA, subject to an overriding prudence standard?

The AESO believes that these are the main questions for determination by the Board in the process options described below.

Procedural Options

In the AESO's view, there is a considerable amount of information concerning the liability issue on the record of this proceeding already, which will obviously be available to the Board in this process. The Board's letter of June 25 contemplates further evidentiary opportunities, and the AESO agrees with such an approach.

The nature of the liability protection issue is such that the AESO does not presently believe that a full oral hearing process is required to effectively and fairly resolve the issue. A written evidentiary process should suffice, although other parties may of course conclude otherwise.

Additionally, and consistent with the Board's wish to expedite the process, the AESO believes that the issue lends itself, at the conclusion of the process, to oral and not written argument, in any event of whether the evidentiary process is oral or written.

The Board will not have reply comments concerning this proposal from interested parties until July 9. In that light, the AESO offers the following procedural options, both written and oral.

Date		
July 9	Reply comments of interested parties on process	
July 16	Board decision on process	
July 25	Evidentiary Submissions from <u>all</u> parties	
August 1	Information requests to all parties filing evidence	
August 8	Responses to information requests from all parties	
August 15	Reply Evidence	
	No Hearing	**Hearing**
August 18	N/A	Hearing begins
August 20	Oral argument	N/A
August 22	Oral reply	Oral argument
August 29	N/A	Oral reply

The AESO has suggested a common filing date for evidentiary submissions in light of the need for an expeditious process, and the fact that there may be parties other than AESO who wish to provide evidence on, for example, indemnification language and terms in their own, or another party's tariff, or for use in bilateral contracts. In so many words, there may effectively be several 'applicants' in this process. Hence, it seems to make sense to proceed with a common filing date.

As noted, it is the nature of the foregoing questions that leads the AESO to conclude that a written process/oral argument is the preferred procedure for the Board to follow. The AESO has endeavored to establish the foregoing schedule having regard not only to the Board's wish to proceed expeditiously, but also in light of the Board's present hearing schedule, as well as the market developments referred to earlier.

Need to Amend Application

The Board will recall that the relief sought in the 2003 GTA Application includes "such further and other Order or Orders as the Board may deem appropriate" (Application, page 1, para. (c)). In this context, the AESO does not believe that it is necessary to further amend the application to accommodate an order or orders of the Board necessary to resolve the liability protection issue, subject only to the approval of the proposed interim tariff amendments addressed in Part I. These amendments, again, are only intended for temporary purposes in order to dispense with any immediate ancillary service market development concerns until the Board deals with the issues in this proceeding. The AESO views the need for permanent amendments to its tariff, if any, as an issue to be determined in the contemplated process.

We trust these comments will be of assistance to the Board in establishing a fair and effective process to deal with the important issue of liability protection. We look forward to receiving the comments of other interested parties. In accordance with your June 25 letter, parties are reminded that if they wish to provide comments to the Board, that they must do so not later than July 9.

A copy of this letter has been emailed to all parties and twelve (12) copies will be delivered to the Board.

Yours very truly

"original signed by Neil Millar"

Neil Millar, P. Eng.
Director, Regulatory Affairs

cc: Interested Parties

EUB Alberta Energy and Utilities Board
Calgary Office 640 – 5 Avenue SW Calgary, Alberta Canada T2P 3G4 Tel 403 297-8311 Fax 403 297-7336

File No. 1808-1-1
Application No. 1306252

August 28, 2003

SENT BY EMAIL

All Interested Parties
Alberta Electric System Operator
2003 General Tariff Application - Liability Module

Dear Sir/Madam:

Re: Alberta Electric System Operator – 2003 General Tariff Application (GTA) Liability Module - Application No. 1306252

Argument Outline and Schedule

Further to the Board's updated process letter dated August 22, 2003, please find below a list of areas that the Board would like parties to address, at a minimum, in Argument. This is not a comprehensive list and parties are free to augment their Argument, as they consider appropriate.

ARGUMENT OUTLINE

1 GENERAL AND BACKGROUND

- Comparison of liability protection of industry participants prior to industry restructuring, including the protection of an integrated utility from non-customer claims for direct and consequential damages and its relevance to today's situation. Clearly identify those aspects that were covered by legislation and those that were covered by the tariff conditions of the integrated Utilities.
- Potential exposure of industry participants if liability protection is not provided and ramifications.
- If liability protection is warranted, what mechanism(s) for providing liability protection for TFOs, ASPs and PPA owners. Legislative, tariff based, insurance should be implemented? Who should do it, when and how?

- Should liability protection be provided for directors, officers, employees, agents and representatives of TFOs, ASPs and PPA owners?
- Should indemnification be provided for consequential loss, direct loss or all loss?
- Should Directors' and Officers' liability protection be included in the legislative solution?

2 LEGISLATIVE SOLUTION TO LIABILITY PROTECTION ISSUE

- Interpretation of Section 90 of the EUA and the AESO's proposal to use it to provide liability protection.
- Problems or gaps in the existing legislation and potential remedies such as the prohibition and indemnification options.
- If legislative solutions are warranted, what process should be used for pursuing legislative options, including a discussion of what role the Board can or should play?
- What, if any, instrument(s) should be used or actions be taken if legislative options are being recommended? What actions should the Board take, how and when? Need for an interim measure (and what form) in the event that the recommended legislative option would take considerable time to implement.

3 TARIFF SOLUTION TO LIABILITY PROTECTION ISSUE

- General discussion on the merits of a tariff solution versus a legislative solution, including any limitations and pitfalls.
- Amendments required to the existing AESO, TFO and DFO tariffs (terms and conditions) to address the liability protection issue, including recommendation of specific changes to these tariffs.
- Use of Distribution Tariffs to effect liability protection. Potential difficulties and options for mitigating impacts.
- Process for implementing a tariff-based solution and whether there is a coordinating role for the AESO in this process.
- If a tariff solution is being advocated in any manner, should the Board finalize in the upcoming decision or should further process be undertaken and how?
- If a tariff solution is being advocated in any manner and further process is being advocated, are any interim changes required in the upcoming decision?

ARGUMENT SCHEDULE

In light of the AESO's request for a for a delay to the dates for Written Argument and Reply established in the Board's July 17, 2003 process letter and the issuance of this argument outline, the Board will adjust the dates for Argument and Reply as follows:

	Original Date	*New Date*
Written Argument	August 28, 2003	***September 12, 2003***

Written Reply	September 5, 2003	***September 19, 2003***

Should you have any questions please contact Jamie Cameron at Jamie.Cameron@gov.ab.ca or by phone at (403) 297-6078 or contact Mike Asgar-Deen at Mike.Asgar-Deen@gov.ab.ca or by phone at (403) 297-8200.

Yours truly,

<Original signed " Michael Asgar-Deen" for >

Jamie Cameron
Application Officer

cc: Interested Parties DISCO and TFO Applications

APPENDIX B –TARIFF AMENDMENT ARTICLE 14

"Appenidx B - Tariff
Amendment Article 1

(Consists of 3 pages)

TARIFF AMENDMENT
ARTICLE 14
LIMITATION OF LIABILITY AND INDEMNIFICATION

(Expires December 31, 2004)

14.1 Notwithstanding anything to the contrary contained in these Terms and Conditions, no action lies against the AESO, nor its affiliates, directors, officers or employees (collectively referred to as the AESO) and the AESO is not liable for any act or omission carried out or purportedly carried out in accordance with this Tariff ("AESO Tariff Act") unless AESO Tariff Act constitutes wilful misconduct, negligence, breach of contract or if the AESO Tariff Act is not carried out in good faith. If the AESO is liable to another person for an AESO Tariff Act, then the AESO is liable for only Direct Loss or Damage suffered or incurred by that other person.

14.2 The AESO is entitled to indemnify persons who provide the AESO with Ancillary Services from liabilities to other persons for loss of profits, loss of revenue, loss of production, loss of earnings, loss of contract or any other indirect, special or consequential loss or damage arising as a result any act or omission carried out or purportedly carried out by the Customer in providing Ancillary Services and to recover through rates charged to Customers any and all costs prudently incurred pursuant to such indemnification, including, without limitation, all indemnification amounts and legal expenses and legal fees on a solicitor and client basis to defend any claims which are the subject of such indemnification or are paid to or on behalf of such provider of Ancillary Services to defend a legal action against such provider.

14.3 In the event a Customer is directed to provide the AESO with Ancillary Services pursuant to Article 24 of this Tariff, the AESO will indemnify and save harmless such Customers, its directors, officers, employees and agents from and against any and all liabilities, damages, losses, costs and expenses (including all reasonable legal expenses and legal fees on a solicitor and client basis) whatsoever and howsoever arising from any legal action, other than for Direct Loss or Damage suffered by the Customer arising from the Customer's negligence, willful misconduct or breach of contract, which may be brought against the Customer, its directors, officers, employees and agents as a result of any act or omission carried out or purportedly carried out by the Customer in providing Ancillary Services under Article 24 of this Tariff to or for the account of AESO.

14.4 Indemnification Procedure:

(a) For purposes of this Article, the term "Indemnifying Party" when used in connection with a claim shall mean the AESO, having an obligation to indemnify a Customer with respect to such claim, and the term "Indemnified Party" when used in connection with a particular claim shall mean a Customer who has been

directed to provide the AESO with Ancillary Services pursuant to Article 24 this Tariff and having the right to be indemnified with respect to such claim by the AESO.

(b) To make claim for indemnification, an Indemnified Party shall notify the Indemnifying Party of its claim under this Article, including the specific details of and specific basis under this Tariff or contract for its claim (the "Claim Notice"). In the event that the claim for indemnification is based upon a claim by a third party against the Indemnified Party (a "Third Party Claim"), the Indemnified Party shall provide its Claim Notice promptly after the Indemnified Party has actual knowledge of the Third Party Claim and shall enclose a copy of all papers (if any) served with respect to the Third Party Claim; provided that the failure of any Indemnified Party to give notice of a Third Party Claim as provided in this Article shall not relieve the Indemnifying Party of its obligations under this Agreement except to the extent such failure results in insufficient time being available to permit the Indemnifying Party to effectively defend against the Third Party Claim or otherwise prejudices the Indemnifying Party's ability to defend against the Third Party Claim.

(c) In the case of a claim for indemnification based upon a Third Party Claim, the Indemnifying Party shall have 30 days from its receipt of the Claim Notice to notify the Indemnified Party whether it admits or denies its liability to defend the Indemnified Party against such Third Party Claim at the sole cost and expense of the Indemnifying Party. The Indemnified Party is authorized, prior to and during such 30-day period, to file any motion, answer or other pleading that it shall deem necessary or appropriate to protect its interests or those of the Indemnifying Party and that is not prejudicial to the Indemnifying Party.

(d) If the Indemnifying Party admits its liability to defend against such Third Party Claim, it shall have the right and obligation to diligently defend, at its sole cost and expense, the Third Party Claim. The Indemnifying Party shall have full control of such defense and proceedings, including any compromise or settlement thereof. If requested by the Indemnifying Party, the Indemnified Party agrees to cooperate, at the cost and expense of the Indemnifying Party, in contesting any Third Party Claim, which the Indemnifying Party elects to contest. The Indemnified Party may participate in, but not control, any defense or settlement of any Third Party Claim controlled by the Indemnifying Party pursuant to this part of Article 14. An Indemnifying Party shall not, without the written consent of the Indemnified Party, (i) settle any Third Party Claim or consent to the entry of any judgment with respect thereto which does not include an unconditional written release of the Indemnified Party from all liability in respect of such Third Party Claim or (ii) settle any Third Party Claim or consent to the entry of any judgment with respect thereto in any manner that may materially and adversely affect the Indemnified Party (other than as a result of money damages covered by the indemnity).

(e) If the Indemnifying Party does not admit its liability or admits its liability to defend the Third Party Claim but fails to diligently defend or settle the Third Party Claim, then the Indemnified Party shall have the right to defend against the Third Party Claim at the sole cost and expense of the Indemnifying Party, with counsel of the Indemnified Party's choosing, subject to the right of the Indemnifying Party to admit its liability to defend and assume the defense of the Third Party Claim at any time prior to settlement or final determination thereof. If the Indemnifying Party has not yet assumed the defense of the Third Party Claim, the Indemnified Party shall nevertheless raise any defence to such claim that may be available to it pursuant to applicable law and shall not compromise or settle any such claim without the consent of AESO, such consent not to be unreasonably withheld. The Indemnified Party shall also send written notice to the Indemnifying Party of any proposed settlement and the Indemnifying Party shall have the option for 15 days following receipt of such notice to (i) admit in writing its liability to defend against the Third Party Claim and (ii) if such liability is so admitted, reject or accept, in its reasonable judgment, the proposed settlement.

14.5 For purposes of Article 14 and 24, the term "Ancillary Services" means those services required to ensure that the AIES is operated in a manner that provides a satisfactory level of service with acceptable levels of voltage and frequency.

14.6 This Article 14 expires on December 31, 2004.

APPENDIX C - LIST OF PARTICIPANTS

Name of Organization
The Alberta Electric System Operator (AESO)
Industrial Power Consumers Association of Alberta (IPCAA)
The City of Lethbridge and the City of Red Deer (Cities)
The FIRM Group Alberta Federation of REAs (REAs) Alberta Urban Municipalities Association (AUMA) Public Institutional Consumers of Alberta (PICA) Consumers' Coalition of Alberta (CCA) Alberta Irrigation Projects Association (AIPA) Alberta Association of Municipal Districts and Counties (AAMDC)
The Service Providers ATCO Electric ATCO Power Altalink ASTC Partnership City of Medicine Hat ENMAX Power Corporation and ENMAX Energy Corporation (ENMAX) EPCOR Utilities Inc. (EPCOR) Independent Power Producers Society of Alberta (IPPSA) TransAlta Corporation Watt-Ex Exchange

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